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Unmasking a Pretext for Res Ipsa Loquitur: A Proposal To Let Employment Discrimination Speak for Itself

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ARTICLES

UNMASKING A PRETEXT FOR RES IPSA LOQUITUR: A PROPOSAL TO LET EMPLOYMENT DISCRIMINATION SPEAK FOR ITSELF

WILLIAM R. CORBETT*

Has too much tort law been incorporated into the case law under the federal employment discrimination statutes? The debate on this issue has been reinvigorated by the Supreme Court's decision in Staub v. Proctor Hospital. *In* Staub, *the Court referred to the Uniformed Services Employment and Reemployment Rights Act, a federal employment discrimination statute, as a "federal tort." The Court then adopted the tort doctrine of proximate cause as the standard for evaluating subordinate bias (or "cat's paw") liability.* Staub *was not the first case in which the Court has suggested that a federal employment discrimination law is a federal statutory tort, but it was the most express and direct statement. Moreover, the Court's adoption of proximate cause, one of the most complicated, confusing, and criticized concepts in tort law, to analyze a prevalent issue in employment discrimination law is striking and provocative.* Staub *reinvigorates the debate about whether the Court and courts have imported too much tort law into employment discrimination law—the debate about the "tortification" of employment discrimination law.*

Most discussions of tortification of discrimination law trace the origin to the Supreme Court's discussion of torts causation standards in Price Waterhouse v. Hopkins. *However, it actually began much earlier. The*

* 2012 Frank L. Maraist Professor of Law, *Paul M. Hebert Law Center of Louisiana State University.* I am grateful for a summer research grant from the *LSU Law Center.* I thank Sandra F. Sperino, Charles A. Sullivan, and Michael J. Zimmer for reading and commenting on an earlier draft.

ubiquitous pretext analysis, developed by the Court to analyze individual disparate treatment cases in McDonnell Douglas Corp. v. Green *is a thinly veiled version of the tort doctrine res ipsa loquitur. Although there have been numerous critiques of the* McDonnell Douglas *analysis that have called for its abrogation, none have exposed it as the much-maligned tort doctrine. Evaluating* McDonnell Douglas *as res ipsa helps explain its weaknesses and shortcomings. After forty years of the pretext analysis, it is time to expel it from discrimination law. Abrogating the* McDonnell Douglas *analysis should be a significant first step in reconsidering the tortification of employment discrimination law.*

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"As one wit said: 'If the thing speaks for itself, why doesn't it talk in English?'"[1]

> *[A]n act of employment discrimination is much more than an ordinary font of tort law. The anti-employment discrimination laws are suffused with a public aura for reasons that are well known. Throughout this Nation's history, persons have far too often been judged not by their individual merit, but by the fortuity of their race, their sex, the color of their skin, or year of their birth, the nation of their origin, or the religion of their conscientious choosing. Congress has responded to these pernicious misconceptions and ignoble hatreds with humanitarian laws formulated to wipe out the iniquity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations.*
>
> *The anti-employment discrimination laws Congress enacted consequently resonate with a forceful public policy vilifying discrimination. A plaintiff in an employment discrimination case accordingly acts not only to vindicate his or her personal interests in being made whole, but also as a "private attorney general" to enforce the paramount public interest in eradicating invidious discrimination.*[2]

INTRODUCTION

What if I told you that the most important analytical framework in employment discrimination law is nothing more than a thinly veiled pretext for one of the most enigmatic, vexatious, and controversial doctrines of tort law? If I told you that the most basic and prevalent analysis in antidiscrimination law really is one of the most distrusted and marginalized analyses in tort law, would you be troubled? What

1. Stemme v. Siedhoff, 427 S.W.2d 461, 465 (Mo. 1968).
2. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated by* 514 U.S. 1034 (1995).

if I told you that the ubiquitous pretext analysis derived from *McDonnell Douglas Corp. v. Green*[3] is actually a slightly retrofitted version of res ipsa loquitur? Would you think that the very foundational analysis of employment discrimination law had been based on the best tort law had to offer or its dregs? This revelation might help explain why current employment discrimination analysis is confused and discredited.[4] Perhaps employment discrimination law should be *detortified*, at least in part, by returning res ipsa loquitur to tort law, and thus permitting employment discrimination to speak for itself without the artificial contortions of an ill-fitting analysis. Employment discrimination law should abandon its most

3. 411 U.S. 792 (1973). The three-stage analysis, proof structure, or proof framework for analyzing employment discrimination claims of intentional disparate treatment was announced by the Supreme Court in *McDonnell Douglas*, *id.* at 802. The *McDonnell Douglas* analysis also is commonly referred to as the pretext analysis. Since 1973, the *McDonnell Douglas* analysis has become pervasive in employment discrimination law and beyond. A Westlaw search indicates that from January 1, 2011 to June 1, 2012, the case was cited in 3280 opinions in the federal courts and 202 opinions in state courts (search terms: "'McDonnell Douglas' w/10 Green" with date restriction). It is used for Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). Although the Supreme Court has not definitively held that the *McDonnell Douglas* analysis applies to the ADEA and the ADA, it has recognized, without disapproval, that the courts of appeals apply the analysis in those contexts. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 49 n.3 (2003) (recognizing that the courts of appeals have used the analysis to evaluate summary judgment motions in disparate treatment claims and applying it under the ADA); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996) (reserving the issue in context of the ADEA, but evaluating the case pursuant to the framework). The *McDonnell Douglas* framework also is commonly adopted by courts to analyze claims under state employment discrimination laws. *See, e.g.*, Zaniboni v. Mass. Trial Court, 961 N.E.2d 155, 158 (Mass. App. Ct. 2012) (stating that the analysis applies to claims under Massachusetts employment discrimination law), *cert. granted*, 967 N.E.2d 634 (Mass. 2012). Beyond employment discrimination law, the pretext analysis has been adopted to analyze other types of federal and state employment claims. *See, e.g.*, Sabourin v. Univ. of Utah, 676 F.3d 950, 958 (10th Cir. 2012) (applying analysis to retaliation claim under the Family and Medical Leave Act); Eagen v. Comm'n on Human Rights & Opportunities, 42 A.3d 478, 487 n.5 (Conn. App. Ct. 2012) (recognizing adoption of pretext analysis for various types of state employment law claims).

4. Attorney Carter G. Phillips, in oral argument before the Supreme Court, expressed the complexity of the employment discrimination proof structures: "I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is." Transcript of Oral Argument at 29, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (No. 08-441); *see also* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 307, 309 (2004) (stating that the statutes do not define "discrimination," that "Title VII law has never been easy," and that "[a]fter more than a decade of litigation under the revised [1991] Act, . . . Title VII law has never been more complex and confusing"); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 71 (2011) [hereinafter Sperino, *Rethinking*] (positing that the rigid proof structures that control employment discrimination law have "led to doctrinal, procedural, and theoretical confusion within employment discrimination law and . . . mired the field in endless questions about frameworks rather than in addressing the field's core issues").

fundamental analysis—the *McDonnell Douglas* pretext analysis; this monumental step would immeasurably improve employment discrimination law. It also might provide an impetus to consider the larger issue of whether transplanted tort law has become too prevalent in employment discrimination law and has eroded to some extent the original public policy and civil rights foundations of that body of law.

Almost half a century ago, Congress began enacting federal statutes intended to address one of the most important civil rights issues—employment discrimination. Given the history of discrimination in this nation, it would be difficult to imagine a more important public policy.[5] However, Congress largely left to the courts the task of fleshing out the lean statutory language with doctrine and principles regarding proof of violations.[6] With such a mission, courts could create legal principles and doctrine out of whole cloth or they could turn to existing bodies of law to borrow principles and doctrines,[7]

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5. *See, e.g.*, H.R. REP. NO. 87-1370, at 2 (1962) ("Clear enunciation and implementation of a national policy on equal employment opportunity are obviously long overdue at this point in the history of the United States."); Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 189 (1993) ("Congress enacted the Civil Rights Act of 1964 in an attempt to assuage a national crisis. . . . Recognizing that discrimination injured the country as a whole, Congress passed Title VII to achieve broad social goals."). There may be no more eloquent statement of the objectives of Title VII than that proclaimed by the Third Circuit in *Mardell*, 31 F.3d at 1234. *See supra* text accompanying note 2.

6. For an interesting discussion of Congress's delegation of the interpretive role for Title VII to the courts and the Equal Employment Opportunity Commission (EEOC), see Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010). Professor Lemos discusses the political battle over whether the principal interpretive role would be delegated to the courts or the EEOC. She notes that ultimately Congress weakened the enforcement authority of the new EEOC and therefore delegated a larger interpretive role to the courts. *Id.* at 385–86. Professor Suzanna Sherry posits that when Congress does not supply factual underpinnings for legislation in either the statutes or the legislative history, the Supreme Court supplies the foundational assumptions that inform the implementing doctrines. *See* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 161.

7. However, resort to common law sources is not necessarily an apt choice. *See* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 34 [hereinafter Sperino, *Discrimination Statutes*] ("[I]t is unclear why judges would look to the common law to define terms in a statutory regime that is not generally drawn from the common law and that does not mimic the common law . . . ."); *cf.* Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1242 (1988) ("Since the national policy against discrimination in employment is not based on the common law, a strong argument can be made that causal analysis should not be as critical an element in employment discrimination law as it is in the law of negligence." (footnotes omitted)). The propriety and balance of importing common law doctrines to develop law under the employment discrimination statutes is a topic that merits separate treatment. For now, it is important to note that courts should recognize some tension, and in some cases, incongruence of purpose between some common law principles and employment

making adjustments to adapt the transplanted law to the objective of combating employment discrimination. In practice, the courts both created and borrowed.[8] The courts had several options of substantive bodies of law from which to borrow principles and adapt them to the law of employment discrimination, including contract, constitutional, agency, property, and tort law. While courts have imported doctrine and principles from several bodies of law,[9] courts have most often turned to tort law.[10]

Although many of the concepts, principles, and doctrines of tort law have proven useful in the context of employment discrimination, it is important to balance the different objectives of tort law on the one hand with the goals of public policy statutes such as the laws addressing employment discrimination on the other.[11] Some torts

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discrimination law. Indeed, some common law principles will be antithetical to employment discrimination law. For example, Professor Richard Epstein recognizes that the employment discrimination laws are diametrically opposed to the common-law based principle of employment at will. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 3 (1992). Commentators have made the case against a common law "baseline" for employment discrimination law. *See, e.g.*, Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 70 (1990) (discussing the "inherent[] inconsist[ency]" of survival of "common-law economic and political premises in light of a statutory scheme" that significantly impinges on employment at will).

8. Regarding the courts' creation of new law, consider for example, the development of the disparate impact theory of employment discrimination. *See infra* Part I.B.

9. *See, e.g.*, Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 171 (2007) (noting "the 'background' rules of contract, tort, and property [that] have emerged to play a vital role in the application of the statutes and doctrines that govern employment discrimination . . . cases"). For example, the Supreme Court has used agency law principles in determining when employers should be liable for sexual harassment. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). In developing a proof structure for cases involving direct evidence of discrimination, the Court turned to the mixed-motives framework developed in the context of a public employee's asserting a violation of first amendment rights. Price Waterhouse v. Hopkins, 490 U.S. 228, 229 (1989) (plurality opinion) (adopting the framework developed in Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). As will be discussed below, however, one of the most divisive issues in the splintered *Price Waterhouse* decision was the standard of causation, and that issue prompted debate about various tort standards of causation that could be incorporated in the *Mt. Healthy* analysis. *See infra* Part I.D.

10. *See, e.g.*, Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 519 (2002) (stating that "the courts have frequently looked to common-law tort doctrines to create the common law of Title VII").

11. *See, e.g.*, *Meritor Sav. Bank*, 477 U.S. at 72 (adapting agency law principles to employer liability for sexual harassment, the Court noted that "such common-law principles may not be transferable in all their particulars to Title VII"); *see also* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for the Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 93 (1995) (contending that "[s]exual harassment is not merely a common-law tort, such as assault, battery, defamation, or intentional infliction of emotional distress; it is also a

concepts and principles might work well if modified, while still others might not be sufficiently adaptable. Thus, courts should have exercised caution in adopting elements of tort law that are not adaptable to the law of employment discrimination.[12] Almost fifty years after the enactment of the first antidiscrimination law, case law has imported a large volume of torts principles and doctrine, including the principles of cause in fact, proximate cause, and res ipsa loquitur.[13] More important than the volume is the centrality of imported tort law in the corpus of employment discrimination law. For example, much of the core of individual disparate treatment law—the most important theory of employment discrimination law[14]—is founded on torts standards of causation and the res ipsa loquitur doctrine.[15] Indeed, the Supreme Court recently starkly declared in *Staub v. Proctor Hospital*[16] that an employment discrimination statute is a federal tort.[17] The *Staub* Court then proceeded to adopt one of the most complicated and criticized principles of tort law as the standard to resolve the common employment discrimination issue presented in the case.[18]

Over the years, some scholars have questioned whether the "tortification" of employment discrimination law is an appropriate evolution for a body of civil rights and public policy law.[19] Now it is important to consider whether this body of law has become too dominated by imported tort law that has been insufficiently adapted to achieve the public policy purposes of the employment discrimination statutes. While the Court's recent proclamation in *Staub* that an employment discrimination statute is a federal statutory tort and its consequent incorporation of more tort doctrine have

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statutory wrong for which Congress has provided free government investigations, federal jurisdiction, and attorneys' fees as well as legal damages").

12. Professor Sperino distinguishes between importation of "pure common law" and common law doctrine that is adjusted to the particular employment discrimination law. *See* Sperino, *Discrimination Statutes*, *supra* note 7, at 45.

13. *See supra* note 3 and accompanying text.

14. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (declaring that "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII").

15. *See supra* note 3 and accompanying text.

16. 131 S. Ct. 1186 (2011).

17. *Id.* at 1191.

18. *Id.* at 1192 (determining that a supervisor's act must be the proximate cause of the adverse employment action for his discriminatory intent to be attributed to the employer when a subsequent decisionmaker implements the adverse employment action).

19. *See, e.g.*, Sperino, *Discrimination Statutes*, *supra* note 7, at 2; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1434 (2012) [hereinafter Sullivan, *Tortifying*]; Zemelman, *supra* note 5, at 177.

captured the attention and concern of employment discrimination scholars, it is just the latest occurrence in the ongoing and escalating tortification.[20] It follows just two years after the Court in *Gross v. FBL Financial Services, Inc.*,[21] to the surprise of many, rejected application of the mixed-motives proof framework under the Age Discrimination in Employment Act and concomitantly entrenched but-for causation, the most plaintiff-hostile torts cause-in-fact standard in general use, as the interpretation of the statutory language "because of . . . age."[22]

The *McDonnell Douglas* analysis, one of employment discrimination law's oldest and most firmly established doctrines, has never been impugned for its "tortiness." While it has been the subject of extensive criticism,[23] the tort lineage of the *McDonnell Douglas* framework rarely has been discussed in scholarly criticism.[24] This Article argues that the *McDonnell Douglas* pretext proof structure is a thinly veiled version of res ipsa loquitur,[25] and that fact is significant

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20. *See* Sperino, *Discrimination Statutes*, *supra* note 7, at 17; Sullivan, *Tortifying*, *supra* note 19, at 1432–34.

21. 557 U.S. 167 (2009).

22. *Id.* at 180. *Gross* is discussed *infra* Part I.D.

23. Criticism of *McDonnell Douglas* is almost as ubiquitous and unabating over the years as use of the framework itself is in the case law. *See, e.g.*, Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1527 n.182 (1997) (agreeing with the premise that the Court abandon the *McDonnell Douglas* analysis); Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 5 (1996) (suggesting the Court should reconsider using the *McDonnell Douglas* analysis and offering suggestions for alternative methodologies); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 704–05 (1995) (describing criticism of the *McDonnell Douglas* analysis as the Court's usurping the role of Congress); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2259 (1995) (discussing the shortfalls of the *McDonnell Douglas* analysis in addressing discrimination); George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43, 43–44 (1993) (describing the decreasing significance of the *McDonnell Douglas* analysis); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 371 (1997) (exploring whether the *McDonnell Douglas* analysis is useful).

24. Current scholarly discussions are focusing on other tortifications of employment discrimination law but not the *McDonnell Douglas* framework. *See, e.g.*, Sperino, *Rethinking*, *supra* note 4; Sullivan, *Tortifying*, *supra* note 19.

25. *See* Burns v. AAF-McQuay, Inc., 96 F.3d 728, 732 (4th Cir. 1996) (describing the *McDonnell Douglas* analysis as "a cousin of res ipsa loquitur"); Robert Brookins, Hicks*, Lies, and Ideology: The Wages of Sin Is Now Exculpation*, 28 CREIGHTON L. REV. 939, 982 n.258 (1995) (stating that "[t]he pretextual channel resembles the res ipsa loquitur model in the law of torts"); William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549, 1564 (2005); Ruth Gana Okediji, *Status Rules as Discrimination in a Post-*Hicks *Environment*, 26 FLA. ST. U. L. REV. 49, 85 (1998) (observing that "the *Hicks* majority's explanation of the *McDonnell Douglas-Burdine* procedural framework strongly echoes the res ipsa loquitur procedural framework"); Sherry, *supra* note 6, at 164 (stating that "*McDonnell Douglas* essentially applies the

because it is a tort doctrine that perhaps never should have been imported into employment discrimination law. Regardless of the propriety of the importation of res ipsa loquitur into employment discrimination law in 1973, courts have not adequately modified the *McDonnell Douglas* framework to serve the public policy objectives behind the employment discrimination laws. Moreover, "res ipsa *McDonnell Douglas*," which is based on the persuasiveness of assumptions supporting an inference, has not been substantially or adequately revised over its forty-year life to reflect changes in the occurrence of discrimination in the workplace or changes in societal views about the occurrence of employment discrimination. Thus, using analysis akin to res ipsa loquitur in employment discrimination law has become not just unhelpful, but an impediment to proving discrimination in many disparate treatment claims and an obstacle to improving and updating the analytical tools of employment discrimination law.

With the tortification of employment discrimination law having reached a new level of audacity in *Staub v. Proctor Hospital*, now is an opportune time to unmask *McDonnell Douglas* as almost unexpurgated tort law that has been foisted upon employment discrimination law. Notwithstanding its pervasiveness and popularity with the courts, the res ipsa loquitur of employment discrimination law has not yet achieved statutory enshrinement,[26] although future codification is by no means farfetched.[27] If the tort origins and foundations of the pretext analysis could be used to undermine it while it is common-law based, such a monumental development might advance a dialogue about the larger topic of importing tort law into employment discrimination law.[28] While employment discrimination law still

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doctrine of res ipsa loquitur to employment discrimination: merely failing to hire (or firing) speaks for itself as evidence of discriminatory intent").

26. *See* Sperino, *Rethinking*, *supra* note 4, at 105 (stating that "*McDonnell Douglas* is not codified in any statutory language").

27. Consider, for example, the Protecting Older Workers Against Discrimination Act, the legislation introduced in 2009 and again in 2012 to overturn *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). S. 2189, 112th Cong. (2012); S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009). The bills would have codified the *McDonnell Douglas* evidentiary framework by providing that plaintiffs asserting employment discrimination claims under Title VII, the ADEA, the ADA and the Rehabilitation Act of 1973 "may demonstrate an unlawful practice through any available method of proof, including the analytical framework set out in *McDonnell Douglas Corp. v. Green*." S. 2189 § 2(b)(3)(C).

28. Commentators referring to the "tortification" of employment discrimination law almost invariably are using the term in a pejorative sense, but there is much about tort law that is good and useful. *Cf.* RED HOT CHILI PEPPERS, *Californication*, *on* CALIFORNICATION (Warner Bros. Records 1999). The adoption and adaptation of tort

retains some of its civil rights and public policy aura, it is time to reclaim some of that ground by acknowledging that tort principles and constructs should not so readily be imported into employment discrimination law.

Part I of this Article discusses the changing perception of the employment discrimination laws—how and why the laws have come to be viewed as federal torts. Part I also considers some of the incorporations of tort law into employment discrimination law that have constituted the "tortification" of the law. Part II critically examines the *McDonnell Douglas* or pretext analysis as an adoption of res ipsa loquitur. Part II then contrasts that adoption of tort law with more innovative employment discrimination principles, standards, and proof frameworks created by the Supreme Court and Congress. Part III proposes the abrogation of the "res ipsa *McDonnell Douglas*" analysis's dominance in employment discrimination law. That part demonstrates how poorly res ipsa loquitur accommodates analysis of employment discrimination claims. Res ipsa loquitur means, "the thing speaks for itself," but by using this analysis in employment discrimination cases, courts are letting an ill-fitting tort doctrine "speak for" employment discrimination law. Courts should strip away the tort pretext to truly let employment discrimination speak for itself. Casting off *McDonnell Douglas*'s vexing analysis, which is itself a mere pretext for res ipsa loquitur, would be a good first step in reversing the almost haphazard tortification of employment discrimination law.

I. THE TORTIFICATION OF EMPLOYMENT DISCRIMINATION LAW

A. Staub—*Tortification of Employment Discrimination Law Reaches its Zenith*

When Title VII of the Civil Rights Act of 1964[29] was enacted, neither Congress nor the Supreme Court would have characterized the federal employment discrimination law as a statutory tort. Title VII was primarily a public policy and civil rights statute aimed at eradicating, in the employment setting, the most socially caustic and destructive forms of discrimination that had blighted the nation

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law in employment discrimination law has not always been bad, and future incorporations need not be bad.

29. Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006)).

throughout its history.[30] Since early in the employment discrimination law era, however, the courts, and to a lesser extent Congress, have vigorously infused discrimination law with the principles of tort law.[31] During its 2011-2012 Term, the Supreme Court moved farther down the road of re-conceptualizing the federal employment discrimination laws as federal torts rather than broad public policy statements regarding civil rights. In *Staub*, the Court, adopting a standard for subordinate bias or "cat's paw" liability,[32] stated that "when Congress creates a federal tort it adopts the background of general tort law."[33] Although the Court was analyzing the Uniformed Services Employment and Reemployment Rights Act of 1994[34] (USERRA), the Court clearly was suggesting that Title VII and the other employment discrimination laws are federal torts as well.[35]

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30. *See supra* note 5 and accompanying text; *see also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (stating that "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace"); H.R. REP. NO. 88-914, pt. 1, at 18 (1963) (stating Title VII's purpose to eliminate discrimination).

31. It is interesting to note that this importation of law is not a one-way street. Professor Martha Chamallas writes of the "degree to which the concepts and values of civil rights law have migrated or can be expected to migrate into tort law." Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2118 (2007).

32. The Court explained the issue as follows: "[plaintiff] sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." Staub v. Proctor Hosp., 131 S. Ct. 1186, 1190 (2011). The Court also explained the origin of the term "cat's paw." *Id.* at 1190 n.1 (noting that the term arose from a fable written by Aesop in which a monkey induces a cat by flattery to take roasting chestnuts from a fire and, when the cat burns its paws, the monkey runs off with the chestnut).

33. *Id.* at 1191.

34. Pub. L. No. 103-353, 108 Stat. 3149 (codified at 38 U.S.C. §§ 4301–4334 (2006)).

35. The principle that the Court was discussing in *Staub*, subordinate bias liability or cat's paw liability, is a general discrimination issue that arises under all of the employment discrimination laws. The USERRA case appears to have served as a vehicle to resolve the issue for employment discrimination law generally. *But see* Holliday v. Commonwealth Brands, Inc., 483 F. App'x 917, 922 n.2 (5th Cir. Aug. 3, 2012) (per curiam) (suggesting that when *Staub* is considered in conjunction with *Gross*, the *Staub* standard may apply to only employment discrimination statutes with "motivating factor" statutory language), *petition for cert. filed*, 81 U.S.L.W. 3393 (U.S. Dec. 20, 2012) (No. 12-764). Prior to *Staub*, the Court had granted certiorari to resolve the issue several years earlier in a Title VII case that settled before the Court's decision. *See* BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 549 U.S. 1334, 1334 (2007). Moreover, among the three cases the *Staub* Court cited in support of the federal tort proposition, one was a Title VII case: *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). *Staub*, 131 S. Ct. at 1191. The Court had not actually called Title VII a federal tort in *Ellerth*; rather, the Court said, "Title VII borrows from tort law the avoidable consequences doctrine." *Ellerth*, 524 U.S. at 764.

The brazen statement in *Staub* was not the first time that the Court has made such a statement about employment discrimination laws.[36] Indeed, Justice O'Connor in her concurring opinion in *Price Waterhouse v. Hopkins*,[37] referred to Title VII as creating a "statutory employment 'tort.'"[38] Even more telling than the Court's use of the tort label in *Staub* was the Court's adoption of the tort concept of proximate cause, one of the most maligned principles of tort law[39] as the test for deciding when to attribute the discriminatory motive of a subordinate to a superior.[40] The Court had little reason to invoke proximate cause in *Staub*.[41] More broadly, proximate cause seems an unusual concept to invoke in employment discrimination law.[42] While the cause-in-fact tort standards have created numerous problems in employment discrimination law, the nebulous concept of

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36. *See* Sullivan, *Tortifying*, *supra* note 19, at 1433 ("Although Title VII has often been described as creating a statutory tort, the panoply of tort doctrines has been applied to this statutory scheme only sporadically and then often in forms influenced by specific statutory language of the law." (footnote omitted)).

37. 490 U.S. 228 (1989).

38. *Id.* at 264 (O'Connor, J., concurring in the judgment) (sorting through torts standards of causation to choose one for the mixed-motives analysis). As Professor Bernstein chronicles, Justice O'Connor was the primary proponent of the thesis that employment discrimination law is statutory tort law. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 510 (1997) (stating that "her colleagues on the Court have never effectively refuted Justice O'Connor's cogent position that employment discrimination is a tort in all but name").

39. Dean Mark Grady, in the course of offering a defense of proximate cause for its greater-than-appreciated predictability and cohesiveness, recognized that many believe that proximate cause is basically incoherent and that its cases either cannot be predicted or that they illustrate some fundamental disorder of the common law. *See* Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 294 (2002); *see also* Sperino, *Discrimination Statutes*, *supra* note 7, at 4 (quoting a leading torts treatise regarding the disagreement and confusion about proximate cause); Sullivan, *Tortifying*, *supra* note 19, at 1459 (stating that "[c]omplaints about the nebulousness of the concept are numerous and longstanding, and there have been determined efforts to eradicate it from legal discourse").

40. *Staub*, 131 S. Ct. at 1187 (citing proximate cause as key to determining liability). Many have decried the complexity, uncertainty, and other negative qualities of proximate cause. Indeed, the dissatisfaction with proximate cause has been so great that the Restatement (Third) of Torts replaces "proximate cause" with "scope of liability," explaining that proximate cause is a poor term to describe the idea embodied in the term. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. b (2010).

41. Sullivan, *Tortifying*, *supra* note 19, at 1455–58 (noting that regarding the result in *Staub*, the invocation of proximate cause seems gratuitous).

42. Sullivan notes three reasons: (1) Proximate cause is "a notoriously amorphous concept even in those areas in which it applies"; (2) proximate cause in torts applies to negligence not intentional torts, and disparate treatment denotes intentional discrimination; and (3) tort law has used proximate cause primarily for physical injuries, not economic injuries. *See id.* at 1459. Even a commentator who is generally favorable about *Staub* recognizes the uncertainty the Court left in its wake. *See* Benjamin Pepper, Comment, Staub v. Proctor Hospital*: A Tenuous Step in the Right Direction*, 16 LEWIS & CLARK L. REV. 363, 367 (2012).

proximate cause seems likely to be even more problematic. What role will proximate cause concepts such as foreseeability, direct causation, scope of the risk, eggshell skull, and intervening and superseding cause have in employment discrimination law? As troublesome as proximate cause has been in tort law, its adoption in employment discrimination law does not bode well. It is difficult to foresee where the adoption of proximate cause in employment discrimination law will lead.[43]

Although the Court's treatment of employment discrimination law in *Staub* has been provocative,[44] it is just the latest step in the ongoing transformation of the employment discrimination statutes into federal statutory torts. However, *Staub* represents a significant step because the Court both unequivocally declared an employment discrimination statute to be a tort and adopted one of the most vexatious of all tort doctrines to address a common employment discrimination issue.

B. In the Beginning

The tortification of employment discrimination law was not imminent when the Supreme Court began interpreting Title VII and developing the law. The 1971 case, *Griggs v. Duke Power Co.*,[45] marked the Supreme Court's first significant encounter with Title VII.[46] The *Griggs* Court adopted disparate impact, an innovative theory of discrimination advocated by the Equal Employment Opportunity Commission.[47] Under the theory, facially nondiscriminatory employment practices and criteria that have a statistically significant disparate impact on members of a protected class constitute illegal discrimination, regardless of intent, if they cannot be justified by

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43. Professor Sullivan posits that the Court may have been preparing to hold that unconscious discrimination is not actionable because such discrimination does not cause the harm. Sullivan, *Tortifying*, *supra* note 19, at 1459. Professor Sperino predicts that "importing proximate cause principles into employment discrimination law will further limit the reach of federal discrimination law, in line with already conservative interpretations of factual causation." Sperino, *Discrimination Statutes*, *supra* note 7, at 3.

44. *See, e.g.*, Sullivan, *Tortifying*, *supra* note 19, at 1445–58; Sperino, *Discrimination Statutes*, *supra* note 7, at 43.

45. 401 U.S. 424 (1971).

46. The Court decided one Title VII case before *Griggs*: *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam). The per curiam opinion reversed a summary judgment on the issue of whether women not having preschool age children was a bona fide occupational qualification for a job. *Id.* at 543–44.

47. *See generally* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011) (examining the history of Title VII disparate impact law).

their relationship and necessity to the job in question.[48] Although it has been argued that the Equal Employment Opportunity Commission (EEOC) created the disparate impact theory,[49] Professor Carle, in an insightful article, has traced the origins of the theory to activists within the National Urban League who developed "experimentalist regulatory strategies" in the early 1900s.[50] No one disputes, however, that the agency charged with enforcement of Title VII played a major role in the development of and advocacy for disparate impact,[51] a legal theory that was not borrowed from tort law or any other obvious common law source. In adopting the disparate impact theory, the Court spoke in eloquent language about the purpose of Title VII to combat both overt and covert forms of discrimination.[52] Through these observations, the Court noted the lofty objective of Title VII.[53]

In contrast with the later adoptions and minor modifications of tort law, disparate impact was innovative and expansive law, and it has been controversial. Indeed, it was so innovative that some argue that the Court reached beyond Congressional intent in enacting Title VII.[54] However, arguments regarding disparate impact's questionable lineage and its alleged inconsistency with Congressional intent were rendered moot by Congress's codification of a version of disparate impact in the Civil Rights Act of 1991.[55]

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48. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The definition and framework for disparate impact were codified in the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(k) (2006).

49. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 249–54 (1990) (describing how the EEOC initiated the interpretation of Title VII that the Court adopted in *Griggs*). *But see* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 435 (2005) (refuting proposition that the EEOC created the disparate impact theory).

50. *See* Carle, *supra* note 47, at 270–74.

51. *See* Lemos, *supra* note 6, at 398–99 (discussing the Court's reliance on the EEOC's guidelines on Employee Selection Procedures).

52. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (noting that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

53. *See id.* ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

54. *See* EPSTEIN, *supra* note 7, at 254–55 (arguing that the "disparate impact theory" came out of the blue); Lemos, *supra* note 6, at 399 n.155 (stating that "[f]ans and opponents of *Griggs* tend to agree that the decision is difficult to square with the available indications of congressional intent").

55. 42 U.S.C. § 2000e-2(k) (2006). Although the battle about disparate impact's past is merely academic, the threat to its future viability is real, with both commentators and a Supreme Court Justice positing that the disparate impact theory may violate the Equal Protection Clause. Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring); Richard A. Primus, *Equal Protection and Disparate*

After *Griggs* was decided in 1971, one might have forecast that the Court would develop the law of Title VII by being creative and fashioning a new body of employment discrimination principles rather than relying heavily on those imported from the common law.[56] However, the creative impulse exhibited in *Griggs* was short-lived and both the Supreme Court and Congress soon began to tortify employment discrimination law. The Court's second significant encounter with Title VII was in 1973 in *McDonnell Douglas Corp. v. Green*.[57]

C. The Changing Perception of the Employment Discrimination Laws

The tortification of employment antidiscrimination law can be viewed in two ways. First and more generally is the changing perception of the laws. Second and more specifically is the incorporation of specific tort concepts, doctrines, and principles into antidiscrimination law with no, few, or inadequate modifications.

The first statements by justices on the Supreme Court analogizing Title VII to torts and expressly adopting tort standards came in 1989 in *Price Waterhouse v. Hopkins*.[58] Before considering the incorporation of specific tort doctrines into employment discrimination law, it is instructive to consider changing views of the employment discrimination laws that have made resort to tort law seem apt and natural. One view of the statutes is that they are manifestations of public policy regarding civil rights, which attempt to eradicate and deter the societal wrong of employment discrimination.[59] While compensation of individual victims' personal injuries is an appropriate goal of public policy and civil rights laws, it is not the

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Impact: Round Three, 117 HARV. L. REV. 493, 585–87 (2003); *see also* Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 588 (2011) (concluding that disparate impact's means of achieving its goals are not sufficient to satisfy the narrow-tailoring requirement).

56. For further discussion of employment discrimination law crafted by the Court rather than imported from common law and tort law, see *supra* notes 129–30 and accompanying text.

57. Although none of the critics of the tortification of employment discrimination law identify *McDonnell Douglas* as a significant step in the process, this Article argues that it was. *See infra* Part II.B.

58. Price Waterhouse v. Hopkins, 490 U.S. 228, 239–42 (1989) (plurality opinion).

59. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 (3d Cir. 1994) ("A plaintiff in an employment-discrimination case accordingly acts . . . to enforce the paramount public interest in eradicating invidious discrimination."), *vacated*, 514 U.S. 1034 (1995).

principal objective.[60] Another view of the employment discrimination laws is that they are essentially federal statutory torts, the primary purpose of which is to compensate individuals for the personal injuries they suffer as a result of discrimination.[61] In the half century since the passage of Title VII, the perception of the employment discrimination laws among courts, commentators, employers, and the general public has moved from the first view toward the second.

A strong critic of the tortification of employment discrimination law, Cheryl Zemelman, expressed her assessment in 1993 that there had been a marked shift from viewing Title VII as a statute encouraging employer responsibility to prevent discrimination to a compensatory statute, focused on repaying victims.[62] Thus, Title VII had become so privatized "that once unthinkable characterizations of the statute now seem commonplace."[63]

How did perception of the employment discrimination laws, a group of public policy and civil rights statutes, so evolve? This Section considers three things that either prompted or indicated a shift in perception: (1) the enactment of section 1981a as part of the Civil Rights Act of 1991; (2) the shift in the most prevalent type of claims from those based on refusal to hire to those based on termination; and (3) courts' increasing restrictions on use of the class action device in employment discrimination litigation, which has been somewhat analogous to the restrictions placed on use of the class action for mass torts.

1. The enactment of § 1981a as part of the Civil Rights Act of 1991

The enactment of § 1981a[64] as part of the Civil Rights Act of 1991[65] was a good and needed change in employment discrimination law.

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60. The Court discussed the dual goals of deterrence or eradication of discrimination and compensation in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421–22 (1975). The Court identified the "primary objective" of Title VII as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 417 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1972)). The Court then went on to recognize that "[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418; *see also* Zemelman, *supra* note 5, at 191 ("The primary emphasis on deterrence, rather than compensation, is reflected in the language and judicial interpretation of Title VII's backpay provision.").

61. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 985 (2010) ("[L]egislatures enjoy the authority to fashion statutory torts—relational wrongs that give rise to private rights of action. This is what statutes like Title VII are all about.").

62. Zemelman, *supra* note 5, at 188, 196.

63. *Id.*

64. 42 U.S.C. § 1981a (2006).

Nonetheless, that change probably has contributed to the view of the employment discrimination laws shifting toward statutory torts. Section 1981a made capped compensatory and punitive damages and jury trials available for disparate treatment claims under Title VII and the Americans with Disabilities Act.[66] The enactment of section 1981a brought more consistency and uniformity to the remedies available for various types of discrimination, although the caps preserved some of the inequality and inconsistency.[67] Before the enactment of section 1981a, plaintiffs with race claims had been able to seek damages and have jury trials under Section 1981,[68] and age discrimination plaintiffs had been able to have jury trials and recover liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA).[69] Outside of race and age claims, the principal monetary remedy available to other employment discrimination plaintiffs was backpay.[70] Under Title VII, before the 1991 Act, sexual harassment plaintiffs who had not lost their jobs would often not have recovered money other than attorney's fees.[71] The 1991 Act changed

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65. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

66. 42 U.S.C. §§ 12101–12213.

67. *See* H.R. REP. NO. 102-40, pt. 1, at 64–65 (1991) ("An unfair preference exists in federal civil rights law. Current civil rights laws permit the recovery of unlimited compensatory and punitive damages in cases of intentional race discrimination. No similar remedy exists in cases of intentional gender or religious discrimination."). The Civil Rights Act of 1991, as enacted, included caps on compensatory and punitive damages. This amendment was a compromise to secure its passage. *See* S. REP. NO. 102-286, at 2–3 (1992) ("In the interest of securing prompt passage of the Civil Rights Act of 1991 . . . Congress accepted the restrictions on damages, and left to 1992 the task of providing full, fair, and equal remedies for victims of discrimination.").

68. *See* H.R. REP. NO. 102-40, pt. 1, at 74 (stating that in providing for damages the Act "authorizes damage awards in Title VII cases in the same circumstances as such awards are now permitted under 42 U.S.C. section 1981 for intentional race discrimination"); *see also* Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of* Koldstad v. American Dental Association, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 477, 482 (2011) (stating that "Congress acted to at least mitigate the disparity created by this set of legal developments by enacting a new section, 1981a"); Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 709 (2010) ("[Section] 1981 provides a federal remedy for race discrimination but does not contain the damages caps found in Title VII.").

69. 29 U.S.C. § 626(b).

70. As the Court explained before the enactment of the Civil Rights Act of 1991, "a plaintiff in a Title VII action is limited to a recovery of backpay, whereas under § 1981 a plaintiff may be entitled to plenary compensatory damages, as well as punitive damages in an appropriate case." Patterson v. McLean Credit Union, 491 U.S. 164, 182 n.4 (1989).

71. *See, e.g.*, H.R. REP. NO. 102-40, pt. 1, at 64–69; Harper, *supra* note 68, at 481 (stating that Congress saw a need to provide additional remedies "in light of the disparity between the legal damages the Court made available for race discrimination in private employment through its interpretation of section 1981 and the limited

that with the addition of capped compensatory and punitive damages and thereby partially rectified a disparity among the types of discrimination claims.[72] There were very good reasons for Congress to enact section 1981a, adding damages and jury trials for discrimination claims that previously did not have those features, but the addition of the damages also strengthened the compensatory objective of the employment discrimination laws. That change, to some, made them seem more tort-like.[73]

The Supreme Court suggested as much in a decision regarding the taxability of an award of backpay under Title VII. In *United States v. Burke*,[74] the Court stated that "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff."[75] The Court responded to the argument that the Civil Rights Act of 1991 changed the remedial provisions and thus made Title VII claims "inherently tort-like in nature."[76] The Court explained that although the availability of jury trials and compensatory damages under the amended Act implies that Congress has changed its view of the injury covered by Title VII, that change could not be attributed to the pre-amendment statute.[77]

Thus, the 1991 Civil Rights Act's amendment to add damages has been viewed as bolstering the compensation objective of the employment discrimination laws and making them more tort-like. Although this view of the change in Title VII (and the Americans with Disabilities Act) wrought by the Civil Rights Act is facile,[78] it

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equitable relief available for sex and other proscribed forms of employment discrimination available under section 706(g) of Title VII").

72. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071, 1071 (1991) (stating the congressional finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace"); Chamallas, *supra* note 31, at 2142 (noting that "[t]he most important change came with respect to remedies: for the first time, Title VII plaintiffs were permitted to obtain jury trials and to recover compensatory and punitive damages, in addition to monetary awards for backpay").

73. *See* Zemelman, *supra* note 5, at 196–97 (positing that "because the Civil Rights Act of 1991 now directly authorizes compensatory and punitive damages for Title VII plaintiffs, numerous lawyers, members of Congress, and executive officers believe that Title VII has become a tort statute").

74. 504 U.S. 229 (1992).

75. *Id.* at 235 (ruling on taxability superseded by statute). The Court found that "Congress' decision to permit jury trials and compensatory and punitive damages under the amended Act signals a marked change in its conception of the injury redressable by Title VII." *Id.* at 241 n.12.

76. *Id.* at 241 n.12.

77. *Id.*

78. It fails to take into account or give proper weight to the following: (1) the dual objectives of the discrimination statutes; (2) the relationship between the two objectives: the availability of compensation enhances deterrence; and (3) the

nonetheless seems to have influenced thinking that the employment discrimination laws became more tort-like with the enactment of the Civil Rights Act of 1991.

2. The shift from claims based on refusal to hire to claims based on termination

A second development that has contributed to the view that the employment discrimination laws have become more tort-like is the shift over the years in the type of adverse employment actions challenged in a majority of discrimination claims[79] and the interaction of that change with the predominant employment law principle in the United States—employment at will.[80] In the first years after enactment of Title VII, most claims were based on refusal to hire, but over the years the majority of claims have become discharge claims.[81] That shift should come as no surprise because over the years employment opportunities became more open to those to whom they had been denied in the past.[82] However, the shift from claims based on refusal to hire to claims based on terminations brought the employment discrimination laws increasingly into tension with employment at will, the basic governing principle for employment termination in forty-nine of fifty states.[83] Employment at will provides that absent contractual, statutory, or other restrictions, an employer can fire an employee for any reason—"good reason, bad reason, or no reason at all."[84] Employment at will is a longstanding,

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objective of Congress to address disparities in the remedies available among the various types of discrimination.

79. Zemelman, *supra* note 5, at 193–94 (explaining that discrimination claims have shifted from challenges to an employer's failure to hire to challenges to promotion or termination decisions).

80. *See generally* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 696–703 (1994) (describing adoption of the employment at will doctrine in each of the fifty states, although Montana enacted a wrongful discharge law in 1987).

81. *See, e.g.*, John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (noting that "[h]iring charges outnumbered termination charges by 50 percent in 1966, but by 1985, the ratio had reversed by more than 6 to 1").

82. *See* Donohue, *supra* note 81, at 1017 (positing that one possible reason for the shift in the kinds of employment discrimination suits is that more women and minorities move into better jobs).

83. *See* Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, 67 U. PITT. L. REV. 295, 343 n.222 (2005) (noting that forty-nine states are characterized as employment at will states). The Montana Wrongful Discharge from Employment Act of 1987, which provides employees with a cause of action for termination not for "good cause," removes that state from the list, although weakly. MONT. CODE ANN. §§ 39-2-901 to -914 (2002).

84. *See* Payne v. W. & Atl. R.R., 81 Tenn. 507, 519–20 (1884) ("All may dismiss their employes [sic] at will, be they many or few, for good cause, for no cause or even

deeply entrenched, and fundamental principle of employment law in the United States.[85] When employees are terminated, many believe their termination is wrongful or unjustified, they experience it as a personal injury, and many want to sue their former employer for "wrongful termination" or "wrongful discharge." Yet, in a nation dominated by employment at will, few plaintiffs can assert viable claims for wrongful discharge.[86]

While most states recognize a tort denominated as wrongful discharge in violation of public policy,[87] the tort is ill-defined, and it is notoriously hard for plaintiffs to recover under the tort theory.[88] Unlike the feckless wrongful discharge tort, the employment discrimination laws are the most significant source of legal protection against unjust termination in the United States because a plaintiff who can allege termination based on race, sex, or age often has a viable employment discrimination claim. Employers, employees, and courts understand that the most significant source of legal protection against unjust termination in the United States is the employment discrimination laws.

Thus, increasingly the discrimination laws have come to be perceived as statutory wrongful discharge torts.[89] Moreover, this may

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for cause morally wrong, without being thereby guilty of legal wrong."), *overruled on other grounds by* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915); *see also* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1655 (1996) (recognizing the "employer's presumptive right to fire employees at will—for good reason, for bad reason, or for no reason at all").

85. *See* Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66 (2000) ("To understand the American system, therefore, it is necessary to understand the doctrine of employment at will, its fundamental assumptions, and its ambivalence. More importantly, it is necessary to recognize where that fundamental assumption has shaped our labor law.").

86. *See* Estlund, *supra* note 84, at 1670 (describing the general problems of the wrongful discharge model as grounded in the inherent difficulty of proving a "bad motive" of the employer and the inequality of bargaining power between the employer and employee).

87. *See id.* at 1662 (explaining that antiretaliation and antidiscrimination doctrines are the basis of the "wrongful discharge" doctrine, which, like tort law, requires proof of a specific wrong on the part of the employer).

88. *See* J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 393–94, 396 (1995) (explaining that most states recognize a tort action for abusive discharge in contravention of public policy, however, the unclear definition of the tort has resulted in several approaches to the public policy justification for tort liability).

89. *Cf.* Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 208–09 (2010) (stating that Title VII can be viewed as "a representative wrongful discharge statute" because "it provides the basis for the most commonly-litigated claims related to employment").

have led to a divisive view of the employment discrimination laws—that the laws bestow job protection on "protected classes."[90]

3. Increasing restrictions on the use of class action device in employment discrimination litigation

A third matter evidencing the changing perception of the employment discrimination laws is that the courts increasingly have made class action suits difficult to maintain in employment discrimination cases.[91] This change is roughly analogous to the restrictions that the courts have placed on the class action device for mass torts,[92] and evinces the perspective that employment discrimination is, or has become, just another font of tort law. As Professor Selmi explained in 2003:

> [T]oday the lawsuits have largely become just another variation of a tort claim where monetary relief is the principal, and often the only, goal of the litigation. Along with this shift in emphasis has come a dramatic change in our perspective on the persistence of discrimination. There is no longer any concerted effort to eliminate discrimination; instead, efforts are directed at providing monetary compensation for past discrimination without particular concern for preventing future discrimination, or even remedying past discrimination, through injunctive relief. For firms,

90. *See* Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 81 (1998) (positing that some who regard themselves as non-protected employees may believe that protected employees are getting preferential treatment because employers must review adverse decisions carefully when dealing with what they believe to be protected classes); Estlund, *supra* note 84, at 1679 (explaining that the combination of antidiscrimination laws and at will employment practice may add to the tension between what are regarded as protected groups and other employees because the latter normally have no recourse against unfair terminations while the former likely have a remedy under the antidiscrimination laws). In reality, Title VII covers all races, sexes, etc., but employers and employees perceive the difficulty of prevailing in reverse discrimination cases.

91. Zemelman, *supra*, note 5, at 194 (emphasizing that the Supreme Court views discrimination not as a wrong against a whole class of persons, but instead as discrete acts against an individual, and, while class actions may serve the rights of the individuals that would otherwise not seek redress, the Court remains skeptical that class actions suits could enforce these public rights).

92. *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1060–62 (2012) (explaining that the class action device is disfavored for mass torts because of problems such as a lack of commonality, a fear of losing autonomy, and a fear of depriving due process rights of individuals); Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice—Constitutional Democracy and the Problem of the Class Action Lawsuit (Part II)*, 104 NW. U. L. REV. 787, 794–95 (2010) (describing the limitation on class actions for mass torts as based on Federal Rule of Civil Procedure 23, which states that the class action is inappropriate where each individual would be affected in different ways, and the constitutional principle of autonomy).

> discrimination, claims are now like accidents—a cost of doing business, which necessarily implies that a certain level of discrimination will persist.
>
> One reason for the change in the nature of the litigation is that employment discrimination class actions have evolved into a purely private realm with little to no government oversight—indeed, . . . with hardly any oversight at all.[93]

The increasing restrictions on use of the class action are a significant limitation in employment discrimination law.[94] If employment discrimination is not an individual, isolated, and sporadic phenomenon,[95] then we would expect claims and litigation to involve systemic claims. Moreover such approaches would be needed to address effectively the type and scope of employment discrimination that routinely occurs.[96] Two theories of discrimination, systemic disparate treatment and disparate impact, address systemic discrimination.[97] The EEOC believes that addressing systemic discrimination claims deserves the agency's focus and resources.[98] Systemic claims of discrimination often are pursued using the class action device, yet courts increasingly have restricted the availability of class actions in employment discrimination.[99]

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93. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1251–52 (2003).

94. *See* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 813 (2004) (discussing "the increasing skepticism—particularly among members of the federal judiciary—toward the class action as an effective dispute-resolution mechanism in the employment context is beginning to take its toll").

95. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 128 (2003) (noting that "discrimination today rarely operates in isolated states of mind; rather, it is often influenced, enabled, and even encouraged by the structures, practices, and opportunities of the organizations within which groups and individuals work").

96. *Id.* at 119 (explaining that as distinguished from individual disparate treatment theory, systemic claims are often pattern or practice cases because they are based on employers' actions directed at members of a particular group).

97. *See id.* at 119–26 (discussing systemic disparate treatment); *id.* at 136–44 (discussing disparate impact); *see also* Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 445–46 (2012) (describing the primary differences between the two systemic discrimination theories).

98. The EEOC launched its systemic initiative in 2006 and its Task Force Report discussed its future plans in the EEOC's 2012–2016 Strategic Plan. *See* LESLIE E. SILVERMAN ET AL., EEOC, SYSTEMIC TASK FORCE REPORT 19 (2006), *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

99. *See* Linda L. Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1, 56 (1990) ("The present Court operates from a highly atomistic, individualistic view of society. Hence, it can support the claims of a plaintiff such as Ann Hopkins in *Price Waterhouse* but is strongly disinclined to permit the problems of racism and sexism to be addressed systemically by either legislation or lower courts.

The Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*,[100] in which the Court disallowed certification of a sex discrimination class of perhaps over a million and a half sales associates, is the latest, and perhaps most significant, manifestation of the limitation of class actions in employment discrimination law.[101] In *Dukes*, female sales associates at Wal-Mart stores throughout the nation sought class certification for their claims that Wal-Mart engaged in intentional discrimination in denying women promotions and in suppressing pay of women compared to men.[102] In a five-four decision, the Supreme Court held that a class action could not be certified under Federal Rules of Civil Procedure Rule 23.[103] The majority gave several procedural reasons, and one was because class actions are not available under Rule 23(b)(2) when claims for monetary relief are more than incidental to claims for injunctive or declaratory relief.[104] The dissent agreed that certification was not appropriate under Rule 23(b)(2), but opined that the certification might have been possible under 23(b)(3), if not for the majority's finding that the requirements of 23(a) were not satisfied.[105] Although *Dukes* was a controversial decision[106] and its effect in practice remains to be seen, it is the latest evidence of the Court's restriction on class actions in employment discrimination cases.[107]

Discrimination issues are restricted to one-on-one showdowns, deciding who is right and who is wrong.").

100. 131 S. Ct. 2541 (2011).

101. *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 527 (2012) (arguing that *Dukes* has altered the Rule 23(a) commonality requirement from one that was a modest burden to one that is now a heavy burden on plaintiffs).

102. *Dukes*, 131 S. Ct. at 2547.

103. *Id.* at 2561.

104. *Id.* at 2560.

105. *Id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part).

106. *Dukes* has both its defenders and its detractors. *Cf. id.* at 2561 (Ginsburg, J., concurring). *Compare* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 28 (criticizing plaintiffs' attempt in *Dukes* to use the class action vehicle to alter substantive employment discrimination law to include both implicit bias and structural discrimination), *with* Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 456 (2011) (arguing that the Supreme Court's decision in *Dukes* "brushed aside the systemic nature of the plaintiffs' claims without a word of analysis"), *and* Zimmer, *supra* note 97, at 447 (indicating that the *Dukes* decision changed the law of systemic discrimination or at least foreshadowed changes that will be made in future cases).

107. *See* Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 479 (2011) (stating that the practical impact of *Dukes* is yet to be determined, but it will likely make it more difficult to certify a nationwide class). Notwithstanding *Dukes*, there may be devices that preserve and reinvigorate the availability of the class action in employment discrimination, such as certification of a class "with respect to particular issues" under Rule 23(c)(4). *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,

The Supreme Court's limitations on the use of class actions in employment discrimination are analogous in some ways to the restrictions on use of class actions for mass torts.[108] Additionally, some judges and commentators are concerned that the employment discrimination class action has become too much like the tort class action—largely private litigation with little oversight in which the principal objective is compensation of the plaintiffs with much less attention to deterrence.[109]

Over the half-century since the enactment of Title VII, the courts have shifted employment discrimination laws to focus on individual personal injury and compensation. This shift toward tort-like application has removed the focus on the public policy behind employment discrimination laws—deterring and eradicating discrimination. This shift has resulted in courts, lawyers, and litigants viewing the employment discrimination laws as "statutory torts."

D. Importation of Tort Doctrines and Principles

As the general perception of the employment discrimination statutes has shifted toward torts, the courts have tortified employment discrimination by importing specific tort principles and doctrines into discrimination law with varying degrees of modification. The most prevalent, overarching, and practically significant incorporation of tort law into antidiscrimination law is the adoption of tort standards of causation as the means for understanding, proving and analyzing the statutory prohibitions on discrimination.

The incorporation of tort cause-in-fact was discussed in the various opinions of the badly splintered Supreme Court decision in *Price Waterhouse*.[110] The focal point of the debate was what causation standard was invoked by Title VII's statutory language "because of . . .

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672 F.3d 482, 490–91 (7th Cir. 2012) (permitting class certification in an employment discrimination case limited to particular issues under Rule 23(c)(4)), *cert denied*, 133 S. Ct. 338 (2012); Hart, *supra* note 106, at 475 (discussing class certification under Rule 23(c)(4)).

108. *See* Smith, *supra* note 92, at 794–95 (detailing the limitation on class action suits in mass torts due to the myriad of legal and factual distinctions among individual members of the class in mass torts that make class certification inappropriate; as such, mass tort classes are generally unable to show the requisite cohesiveness or predominance of common issues); *see also* Campos, *supra* note 92, at 1061 (discussing *Dukes* in the framework of mass tort class action suits, and noting the concerns with litigant autonomy and due process rights).

109. *See supra* note 93 and accompanying text (detailing the changing perception of employment discrimination laws).

110. Price Waterhouse v. Hopkins, 490 U.S. 228, 264–66, 282–85 (1989) (plurality opinion).

race, color, religion, sex, or national origin."[111] The plurality rejected the idea that "because of" means but for causation.[112] The Court, borrowing a procedural framework from constitutional law, required a two-step process. First, the plaintiff was required to prove—as the prima facie case—that the relevant protected characteristic was a motivating factor in the adverse employment decision. If the plaintiff successfully proved the first step, the burden of persuasion then shifted to the defendant to prove that it would have taken the same action in the absence of a discriminatory motive (the same-decision defense).[113] The Court first developed this analysis in *Mt. Healthy City School District Board of Education v. Doyle*,[114] a case in which a terminated public school teacher asserted a First Amendment free speech claim.[115] The plurality opinion in *Price Waterhouse* selected "motivating factor" as the standard of causation in the plaintiff's prima facie case,[116] whereas the Court in *Mt. Healthy* expressed the standard as "'substantial factor'—or to put it in other words, . . . a 'motivating factor.'"[117] Justice O'Connor's influential concurring opinion,[118] argued that "because of" did mean "but for," and she was not willing to shift the burden of persuasion to the defendant employer on the same-decision defense until the plaintiff satisfied a more demanding standard of causation at the prima facie case stage.[119] Thus, Justice O'Connor's concurrence selected "substantial

111. 42 U.S.C. § 2000e-2(a)(1) (2006).

112. *Price Waterhouse*, 490 U.S. at 240 (plurality opinion). Twenty years later, a majority of the Court repudiated the conclusion that "because of" does not mean but for. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

113. *Price Waterhouse*, 490 U.S. at 244–45 (plurality opinion).

114. 429 U.S. 274 (1977).

115. *Price Waterhouse*, 490 U.S. at 248–49 (plurality opinion). The *Price Waterhouse* Court also noted that it had approved such an analysis for a claim under the National Labor Relations Act in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Price Waterhouse*, 490 U.S. at 246–47 (plurality opinion). In *Transportation Management*, the Court approved the National Labor Relations Board's reliance in *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), on *Mt. Healthy* in developing its analysis of the plaintiff's wrongful discharge claim. *Mt. Healthy*, 462 U.S. at 403–04.

116. *Price Waterhouse*, 490 U.S. at 244–45 (plurality opinion).

117. *Mt. Healthy*, 429 U.S. at 287.

118. Appellate courts have relied upon Justice O'Connor's concurrence to glean a rationale for the Court's application and interpretation of the mixed-motives framework. *See, e.g.*, Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999) (explaining that most courts believe that O'Connor's concurrence is the best method for addressing mixed motives cases), *abrogated by* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). *But see* Recent Cases, Costa v. Desert Palace, Inc., *299 F.3d 838 (9th Cir. 2002) (en banc), cert. granted, 123 S. Ct. 816 (2003)*, 116 HARV. L. REV. 1897, 1903–04 (2003) (arguing that appellate courts have relied on the wrong *Price Waterhouse* opinion when discussing the mixed-motives framework).

119. *Price Waterhouse*, 490 U.S. at 266–67 (O'Connor, J., concurring in the judgment) (explaining that plaintiffs have a high burden of proof at the first stage).

factor," treating it as a higher standard and not subscribing to the interchangeability of "motivating factor" and "substantial factor" in *Mt. Healthy*.[120] Referring to the "statutory employment 'tort' created by Title VII,"[121] Justice O'Connor turned to torts case law to find a suitable basis for shifting the burden of persuasion and relied on *Summers v. Tice*,[122] in which the California Supreme Court aided a plaintiff shot by one of two hunters who could not prove which breach caused the harm by shifting the burden to the defendants to prove they did not cause the harm.[123] She also cited another torts case applying a shifting burden, *Kingston v. Chicago & Northwestern Railway Co.*,[124] a case of concurrent sufficient causes, in which one cause of the fire damage was the railroad company's negligence and the other was an innocent or unknown cause.[125] Thus, the *Price Waterhouse* plurality and Justice O'Connor's concurring opinion imported several tort cause-in-fact principles into employment discrimination law, offering alternatives to the one-step but-for standard.

The dissent in *Price Waterhouse* argued that the plurality was incorrect, insisting that "because of," "by any normal understanding," and as used "in everyday speech" does mean but for.[126] But for is the minimum standard used in common law approaches, the dissent noted, citing tort law.[127] The dissent then explained that the plurality actually did, contrary to its protestations, adopt a but-for causation test in two steps.[128]

Although the opinions in *Price Waterhouse* discussed tort causation standards, what the Court created was a two-part analysis with a shifting burden of persuasion that had no analogue in tort law. Moreover, Congress's subsequent modifications of the mixed-motives analysis in the Civil Rights Act of 1991 preserved this burden-shifting

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120. *Id.* at 265 (noting that Congress intended that plaintiffs show not only that an illegitimate criterion be a substantial factor in the employment decision, but that the illegitimate criterion actually caused the employment decision).

121. *Id.* at 264. O'Connor's concurring opinion followed the "statutory tort" label by noting the two primary functions of Title VII: the deterrence goal related to public policy and the compensation or make-whole goal.

122. 199 P.2d 1 (Cal. 1948).

123. *Price Waterhouse*, 490 U.S. at 263 (O'Connor, J., concurring in the judgment).

124. 211 N.W. 913 (Wis. 1927).

125. *Price Waterhouse*, 490 U.S. at 263–64 (O'Connor, J., concurring in the judgment).

126. *Id.* at 281 (Kennedy, J., dissenting); *see also id.* at 262–63 (O'Connor, J., concurring in the judgment) (also arguing that the plurality was incorrect in assuming that "because of" does not mean "but for").

127. *Id.* at 282 (Kennedy, J., dissenting) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 9, 265 (5th ed. 1984)).

128. *Id.* at 285.

in employment discrimination analysis, which differs from tort law.[129] Congress also selected the ostensibly lower standard of causation—"motivating factor"—rather than "substantial factor" for the plaintiff's prima facie case that triggers the shift in the burden of persuasion[130] Thus, although the mixed-motives analysis incorporates tort causation standards, the two-part analysis is drawn from other sources of law, and Congress made adjustments in the statutory mixed-motives-analysis to accommodate the objectives of Title VII.

The adoption of tort standards of cause-in-fact in Title VII analysis was the most significant tortification of employment discrimination law because all analyses of intentional (disparate treatment) discrimination focus on causation.[131] The *Price Waterhouse* mixed-motives analysis was developed with the Court disagreeing about the standard of causation to be applied. Regarding the other principal analysis for individual disparate treatment claims, *McDonnell Douglas/*pretext, the Supreme Court has not engaged in a protracted debate or discussion about what tort cause-in-fact standard it incorporates in pretext cases as it did with mixed-motives. The Court has suggested, however, that the pretext analysis incorporates but-for causation.[132]

The formula the Court developed for the statutory language "because of" provides that discriminatory motive must be the cause-in-fact of the adverse job action.[133] Many scholars have criticized this incorporation of tort law cause-in-fact standards into the core of intentional discrimination analysis.[134] One commentator posits that

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129. *See* Sperino, *Discrimination Statutes*, *supra* note 7, at 17 (explaining that employment discrimination diverges from traditional tort law since the employer wins only a partial defense to damages if the employer prevails on the second part of the factual cause standard).

130. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 244–45 (plurality opinion) (interpreting legislative history of Title VII to require that a covered trait was the motivating factor in the employment decision).

131. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009) (discussing *Price Waterhouse* and finding that the burden of persuasion in an ADEA disparate-treatment case is on the plaintiff to prove causation and it never shifts).

132. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (positing that the plaintiff is only required to show that race was a but for cause of the discharge).

133. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1183 (1995) (noting that the Court's formulation of "because of" requires triers of fact to determine the employer's mental state when the alleged discrimination occurred).

134. *See, e.g.*, Paul J. Gudel, *Beyond Causation: The Interpretation of an Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 107–08 (1991) (arguing that the current causation standard is inappropriate in employment discrimination cases).

the formula is not apt because the analogy to tort causation is flawed: Motives do not cause discriminatory acts; thus, "trying to interpret human actions as if they were problems in causation is fundamentally misconceived."[135] Similarly, other commentators have argued that the causation formula fails to depict how the phenomenon of discrimination actually occurs, as it often results from unconscious or subtle bias.[136]

My critique of the tortification of employment discrimination law does not end, however, with the propriety of adoption of tort principles. It is one thing to criticize the Court for the importation of tort cause-in-fact standards into employment discrimination law—the most important and far-reaching tortification of discrimination law. Nonetheless, the cause-in-fact standards are well-established, deeply imbedded, and, in fairness, not far removed from the statutory language. So, I do not expect the Supreme Court to adopt a new approach to importation of tort law into employment discrimination law and consequently abandon the cause-in-fact standards. However, another facet of tortification is the possible modification of tort concepts either at the time of adoption or over time to better achieve the objectives of employment discrimination law. Even if one lauds or accepts the Court's adoption of cause-in-fact standards, the Court's trajectory in developing and adjusting cause-in-fact law in employment discrimination has been far less impressive.

The most basic tort cause-in-fact standard, and the most onerous for torts plaintiffs to satisfy, is but for causation.[137] What emerged from *Price Waterhouse* was a proof framework that, as the dissent demonstrated, maintained but for causation.[138] The shifting burden of persuasion, however, was an innovative adjustment, which enabled the plaintiff to move forward and even win the case by proving a lower standard of causation at the prima facie case stage, subject to

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135. *Id.* at 20.

136. *See* Green, *supra* note 95, at 131 (arguing that focusing on causation places the emphasis on the individual rather than on the workplace environment); Krieger, *supra* note 133, at 1168–77 (describing the Court's formulation of causation and intent under Title VII).

137. While sole or only cause is available, it is not generally used in either tort law or employment discrimination law. For a recent case discussing the erroneous use of "sole cause" in the circuit's Title VII case law, see *Ponce v. Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012) (banishing "the word 'sole' from [the circuit's] Title VII lexicon").

138. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 281 (1989) (Kennedy, J., dissenting) (explaining that the plurality's two-part analysis incorporates but-for causation). *But see id.* at 240 (plurality opinion) (refusing to construe "because of" as colloquial shorthand for but for causation).

rebuttal by the defendant's same-decision defense.[139] As Justice O'Connor noted, there were a few types of torts cases in which such a variation on but-for causation was used. Thus, one could have been optimistic at the time of *Price Waterhouse* and Congress's adjustment of the *Price Waterhouse* mixed-motives analysis that the Court and Congress would appreciate the differences between tort law and employment discrimination law and adjust the tort causation standards appropriately over time as employment discrimination cases arose that demonstrated the need.

The evolution of tort cause-in-fact standards reached its nadir in 2009. The promise of *Price Waterhouse*, the Civil Rights Act of 1991, and innovative circuit court opinions, such as *Rachid v. Jack in the Box, Inc.*,[140] seemed to signal that Congress and the Courts would adjust tort cause-in-fact to accommodate the objectives of employment discrimination law, but instead the Supreme Court went in a different direction in *Gross v. FBL Financial Services, Inc.*[141] In a surprising opinion, the Court addressed an issue on which it had not granted certiorari, holding that the mixed-motives analysis, with its shifting burden of persuasion, does not apply to the Age Discrimination in Employment Act. The majority opinion in the 5-4 decision insists that the statutory language "because of" does mean but for causation,[142] and expresses distaste for the burden-shifting mixed-motives framework.[143] The *Gross* decision, thus, retreats from the innovative mixed-motives variation on but for causation and arguably entrenches the but for standard in all employment discrimination statutes that use only the "because of" language;[144] this includes all

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139. *See id.* at 258 (plurality opinion) (holding that after the plaintiff proves that an impermissible trait, such as race, gender, or national origin, was a motivating factor in the employment decision, the defendant may avoid liability only by invoking the same-decision defense). Justice O'Connor provided two examples of common law tort cases where a variation on but-for causation shifts the burden to the defendants to prove that their action was not the but for cause of the plaintiff's injury: (1) "multiple causation cases, where a breach of duty has been established," and (2) cases "where the effect of a defendant's tortious conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff." *Id.* at 263–64 (O'Connor, J., concurring in the judgment).

140. 376 F.3d 305 (5th Cir. 2004). *Rachid* is discussed *infra* Part II.C.3.

141. *See* 557 U.S. 167 (2009).

142. *Id.* at 176–77.

143. *See id.* at 179 (stating that it is apparent that *Price Waterhouse*'s burden-shifting framework is difficult to apply). For example, in jury trials it has been particularly difficult for judges to explain *Price Waterhouse*'s burden-shifting framework through jury instructions. *Id.*

144. Because the Court was interpreting "because of" statutory language, the decision might render the mixed-motives framework inapplicable to all discrimination statutes except Title VII, which also has the statutory "motivating factor" language. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961–62

statutes except Title VII, to which the Civil Rights Act of 1991 added "motivating factor."[145]

The dissenting opinions in *Gross* disagreed with the majority's equation of but for with "because of" and its departure from both *Price Waterhouse* and perceived congressional intent in the Civil Rights Act of 1991.[146] One dissenting opinion, written by Justice Breyer, focused on the differences between tort law and employment discrimination law, which justify application of different principles. Justice Breyer's dissent expressed that view as follows:

> It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive.[147]

Gross remains the law despite protestations from a variety of different interests.[148] There was even an attempt in Congress to

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(7th Cir. 2010) (finding that the *Gross* holding renders mixed motives inapplicable to Americans with Disabilities Act). *But see* Smith v. Xerox Corp., 602 F.3d 320, 329 (5th Cir. 2010) (refusing to extend the holding of *Gross* to the antiretaliation provision in Title VII because the *Gross* court specifically refused to incorporate Title VII decisions in its analysis). The Supreme Court has granted certiorari in a case in which it may resolve the scope of the Gross holding. *See* Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448 (5th Cir. 2012), *cert. granted*, 2013 WL 203552 (Jan. 18, 2013).

145. 42 U.S.C. § 2000e-2(m) (2006).

146. *Gross*, 557 U.S. at 180 (Stevens, J., dissenting).

147. *Id.* at 190 (Breyer, J., dissenting).

148. Not surprisingly, the AARP did not like the decision. *See* David G. Savage, *Supreme Court Makes Age-Bias Suits Harder To Win*, L.A. TIMES (June 19, 2009), http://articles.latimes.com/2009/jun/19/nation/na-court-age-bias19 (discussing how the Supreme Court's conservative decision will make it harder for older workers to bring successful age-discrimination claims because it eliminated the long-standing two-step approach and replaced it with the requirement that plaintiffs "bear the full burden of proving that age was the deciding factor in the dismissal or demotion"). AARP attorney Thomas W. Osborne was critical of the decision, characterizing it as one of several Court decisions suggesting that age discrimination is different from other types and not as serious. *See* Susan J. McGolrick, *Justices 5–4 Adopt But-For Causation, Reject Burden Shifting for ADEA Claims*, Daily Lab. Rep. (BNA) No. 116, at AA-1 (June 19, 2009) (noting that Osborne was "absolutely" surprised by "how far the court went" in the *Gross* decision). Senate Judiciary Committee Chairman Senator Patrick Leahy stated as follows: "By disregarding congressional intent and the time-honored understanding of the statute, a five member majority of the Court has today stripped our most senior American employees of important protections." *Id.* at AA-3. Senator Leahy further likened the *Gross* decision to the Court's "wrong-headed" ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which Congress overturned in the Lilly Ledbetter Fair Pay Act of 2009. *Id.* For other criticism, see Kevin P. McGowan, *EEOC Provides Guidance on Waivers, Hears Testimony on Age Bias Developments*, Daily Lab. Rep. (BNA) No. 134, at A-14 (July 16, 2009) (noting that outside witnesses criticized the Supreme Court holding in *Gross* at a July 15 EEOC

overrule the decision by introducing legislation, the Protecting Older Workers Against Discrimination Act.[149] This frustration is not unwarranted. *Gross* is among the most disappointing and alarming of the Supreme Court's decisions tortifying employment discrimination law. Having demonstrated its facility with adapting torts standards to the objectives of employment discrimination law, the Court did not do that in *Gross*. Rather, the *Gross* Court limited innovations and reverted to the most basic causation standard, which is also the most onerous for plaintiffs to satisfy.[150] This is not a propitious trajectory for the management of transplanted tort doctrine.

A further incorporation of tort law into employment discrimination law, although less express, is the Supreme Court's recognition of hostile environment sexual harassment as a covered type of employment discrimination in *Meritor Savings Bank v. Vinson*.[151] The harassment theory, particularly hostile environment,[152] is very tort-like,[153] focusing on the dignitary harm that results from the discrimination.[154] The Supreme Court, in developing the employer's affirmative defense to liability for supervisor sexual harassment in *Burlington Industries, Inc. v. Ellerth*,[155] invoked the tort doctrine of avoidable consequences.[156] Harassment theory has expanded the types of conduct and resulting injuries for which plaintiffs may seek recovery under employment discrimination law, and it is an area of employment discrimination that is very tort-like.

The foregoing are some of the most salient examples of tort law being imported into employment discrimination law. Although there are other examples,[157] the Court's recent incorporation of proximate

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meeting); *Editorial, Age Discrimination*, N.Y. TIMES, July 7, 2009, at A22 (calling for Congress to reverse *Gross* as it did *Ledbetter*).

149. *See supra* note 27.

150. *See supra* note 137 and accompanying text.

151. 477 U.S. 57 (1986).

152. Although the Court stated that the terms "quid pro quo" and "hostile environment" are of "limited utility," it acknowledged that they remain relevant in distinguishing types of conduct. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 743 (1998). In fact, courts still use the terms frequently.

153. Professor Chamallas has described the migration of law regarding sexual harassment as moving from employment discrimination to tort. *See* Chamallas, *supra* note 31, at 2180–87 (discussing how the law of sexual harassment has influenced development of the tort of intentional infliction of emotional distress).

154. *See* Bernstein, *supra* note 38, at 451 (discussing the "tort-like wrong of sexual harassment").

155. 524 U.S. 742 (1998).

156. *Id.* at 764 (stating that "Title VII borrows from tort law the avoidable consequences doctrine").

157. *See, e.g.*, Frank, *supra* note 10, at 520 (recognizing that included in these tort principles are the doctrines of "avoidable consequences . . . , respondeat superior

cause theory to determine subordinate bias liability is the latest example, and it ushers into employment discrimination law a tort principle that has been more troublesome in torts than cause-in-fact.

II. *MCDONNELL DOUGLAS* FRAMEWORK: A PRETEXT FOR RES IPSA LOQUITUR

Although the tortification of employment discrimination law has attracted attention and commentary, few have implicated the pretext analysis developed in *McDonnell Douglas*. Some courts and commentators have remarked that pretext analysis is an incorporation of the tort doctrine of res ipsa loquitur into antidiscrimination law.[158] This Part explores the relationship between the *McDonnell Douglas* pretext analysis and res ipsa. It also contends that the most significant analysis in employment discrimination law should not be modeled on a tort analysis used for unusual cases in which the breach in a negligence claim is a mystery. It begins by examining the tort doctrine of res ipsa loquitur and ends by recommending that res ipsa, as manifested in the *McDonnell Douglas* pretext analysis, should be extirpated from employment discrimination law.

A. Res Ipsa Loquitur: Latin for "The Thing Speaks for Itself"

The tort "doctrine"[159] of res ipsa loquitur seems to be an exotic mantra imbued with mystical powers. In fact, it is not so mysterious. It is well explained as a rule regarding the use of circumstantial evidence in a negligence case. The Restatement (Third) of Torts describes res ipsa in this way:

> [R]es ipsa loquitur is circumstantial evidence of a quite distinctive form. The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved.[160]

Differently stated, res ipsa permits the fact finder to infer or presume a breach by the defendant(s) when the plaintiff has

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liability, the discovery rule, shifting burdens of proof, the fellow servant rule, principles of causation, the eggshell skull rule, and others").

158. *See supra* note 25 and accompanying text.

159. Res ipsa has been variously characterized "as a rule, principle, doctrine, maxim, and [by] one particularly frustrated scholar, a myth." G. Gregg Webb, Note, *The Law of Falling Objects:* Byrne v. Boadle *and the Birth of Res Ipsa Loquitur*, 59 STAN. L. REV. 1065, 1065 (2007).

160. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 17 cmt. a (2010).

difficulty producing evidence of a specific act or acts by the defendant(s) that constitute a breach of the standard of care.[161]

The incantation and invocation of res ipsa is seductive. From many years of grading the Torts exams of first-year law students, I know that they are eager to find res ipsa in every exam, if not every fact pattern on an exam.[162] Plaintiffs also seem to be eager to include res ipsa in their pleadings and requested jury instructions because res ipsa enables a plaintiff who successfully invokes it to take a case to the fact finder without proving the precise breach committed by the defendant.[163] Rather, the jury is instructed that it may find some undefined breach by the defendant based on the circumstantial evidence.[164] Plaintiffs likely also enjoy a second less obvious advantage: under res ipsa, the cause-in-fact inquiry becomes muddled, and defendants often have no clear target in arguing absence of cause-in-fact.[165] The but-for causation test inquires whether the damage would have occurred if the breach had not occurred. If the breach is presumed but not clearly defined, it is more difficult to answer the counterfactual inquiry posed by cause-in-fact analysis. Thus, if the fact finder is willing to infer that an unknown breach occurred, it may be willing to presume cause-in-fact as well.

1. Historical Origins of Res Ipsa Loquitor

For a doctrine shrouded in mystery, there is nothing mysterious about the source that gave it impetus, although that case was not its origin.[166] The phrase is traced to the pronouncement of Chief Baron

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161. *See id.* § 17 cmt. j (noting that most jurisdictions allow res ipsa to create a permissive inference of breach).

162. Perhaps it is the allure of Latin. *See* Clifford A. Hull et al., *Understanding Latin Legalese*, *available at* http://www.dummies.com/how-to/content/understanding-latin-legalese.html (proposing that lawyers' fondness of Latin phrases stems from the strong influence that ancient Rome's legal system had on Western countries).

163. *See, e.g.*, Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 146 (2011) (explaining that res ipsa loquitur is "a powerful force that militates against holding a plaintiff's lack of access to crucial evidence against him where the totality of the circumstances indicates that there is not a sound reason to do so").

164. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 17 cmt. a (explaining how the jury can reason from general to specific to infer if there was a breach).

165. *See, e.g.*, Erik S. Knutsen, *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach*, 38 TEX. INT'L L.J. 249, 277–78 (2003) (exploring the relationship between res ipsa and ambiguous cause-in-fact cases).

166. *See* RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965) (attributing the origin to Baron Pollock in *Byrne v. Boadle*); Webb, *supra* note 159, at 1067 ("Rarely has the first use of a well-known legal phrase been so clearly traceable to an

Jonathan Frederick Pollock in the 1863 British case *Byrne v. Boadle*.[167] The case involved a barrel falling out of a shop on a London street, hitting a passerby, and permanently injuring him.[168] The attorney for the business argued that the plaintiff had not proven a breach by the defendant or its employees.[169] Chief Baron Pollack launched the doctrine of res ipsa loquitur on its dubious career when he responded, "There are certain cases of which it may be said res ipsa loquitur, and this seems one of them."[170] The doctrine would be more fully developed in two subsequent cases.[171] The dissent of Chief Justice Erle in *Scott v. London & St. Katherine Docks Co.*[172] suggested the addition of the predicate facts that the injury-causing thing is shown to be under the control of the defendant or its servants and such accidents ordinarily do not happen if those in control of the thing use proper care.[173] Next in *Briggs v. Oliver*,[174] the phrase res ipsa loquitur was combined with the predicate facts from Erle's dissent.[175] One commentator's chronology of the development of the doctrine traces it back to an earlier principle in English law of presumptive negligence when passengers of common carriers were injured and suffered from a deficit of evidence to establish a breach by the common carrier.[176] The adaptation of this principle of presumptive negligence in the broader range of cases to which res ipsa was applied was a positive development for plaintiffs, who were aided by the doctrine.[177]

In American tort law, the Restatement (Second) of Torts set forth the "principle" of res ipsa loquitur, stating that negligence may be inferred as the cause of a plaintiff's damage when the following predicate facts are established: the event is of a kind that ordinarily does not happen in the absence of negligence; other causes, such as conduct of the plaintiff and third parties, is sufficiently eliminated;

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individual case."). *But see* Webb, *supra* note 159, at 1077 (tracing the term to a 1614 British case).

167. (1863) 159 Eng. Rep. 299, 300 (Exch.).

168. *Id.* at 299.

169. *Id.* at 299–300.

170. *Id.* at 300.

171. *See* Webb, *supra* note 159, at 1107–08 (following the evolution of the doctrine).

172. (1865) 3 H. & C. 596, 601 (Exch.).

173. *Id.* at 667.

174. (1866) 4 H. & C. 403 (Exch.).

175. *See* Webb, *supra* note 159, at 1108 (describing the incorporation of res ipsa with Erle's dissent in *Briggs* as the final step in res ipsa's beginnings).

176. *Id.* at 1084–88.

177. *Id.* at 1107 (stating that "[r]es ipsa loquitur, as it was applied in *Byrne* and its progeny, blurred the edges of negligence in favor of injured plaintiffs, not defendant businesses").

and the negligence is within the scope of the defendant's duty.[178] Other courts and authorities have included another element: that evidence of the cause of the injury is more accessible to the defendant than the plaintiff.[179] While accessibility was not a part of the Restatement (Second)'s prerequisites, the comment to section 328D recaptured the last element, stating that a plaintiff may eliminate other responsible causes by showing that the cause of the event was within the defendant's responsibility or that the defendant was responsible for all reasonably probable causes.[180]

2. *Three problems with res ipsa (that it shares with* McDonnell Douglas*)*

a. *The amorphous prerequisite facts of res ipsa*

The establishment of certain prerequisite facts continues to be a central feature of res ipsa law, which justifies application of the doctrine and its advantages for plaintiffs. The prerequisite facts also provide some assurance that the defendant most likely breached the standard of reasonable care in some undefined or ill-defined way notwithstanding the plaintiff's inability to prove the particular breach.[181] The Restatement (Third) explains the reticence about this doctrine: "[R]es ipsa loquitur does produce an element of discomfort, inasmuch as the defendant can be found negligent without any evidence as to the nature or circumstances of the defendant's actual conduct. This discomfort leads to some circumspection in the application of res ipsa loquitur."[182] Notwithstanding this uneasiness, the Restatement (Third) pares down the requirements for application of res ipsa to a more basic requirement: "the accident causing the plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member."[183]

The role of the prerequisite facts for invoking res ipsa is to justify finding a breach and perhaps holding a defendant liable despite the plaintiff's inability to prove a specific breach. Yet the role of

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178. RESTATEMENT (SECOND) OF TORTS § 328D (1965).

179. *See* William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 260 (1936). It has been argued that the accessibility-to-evidence element is used when courts want to expand res ipsa. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 244 (5th ed. 1984)).

180. RESTATEMENT (SECOND) OF TORTS § 328D cmt. g.

181. *See* Okediji, *supra* note 25, at 84 (acknowledging that prerequisites give assurance that negligence likely occurred).

182. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 17 cmt. a (2010).

183. *Id.* § 17.

prerequisite facts in invoking res ipsa is one of the issues that has generated the most disagreement among courts and authorities. The early English case law and the Restatement (Second) articulated the requirement of three prerequisites.[184] The Restatement (Third) adopted a pared-down test for the applicability of res ipsa.[185] The two other versions that were rejected by the latest Restatement consist of two steps.[186] The first applies res ipsa if the accident is of a type that usually occurs because of negligence and the instrumentality causing the harm was under the exclusive control of the defendant.[187] The other two-step formulation requires that the type of accident usually happens because of negligence, and such negligence is usually that of the defendant rather than some other party.[188]

Thus, one of the most unsettled and vexing features of res ipsa loquitur is the disagreement and uncertainty regarding the predicate facts which determine whether res ipsa loquitur applies to a given case. This is a major problem because the predicate facts justify giving a plaintiff the advantages of res ipsa. If there is confusion, disagreement, or loss of confidence in these foundational facts, then res ipsa is likely to be seen as creating an unjustified inference or presumption that eases the usual burden and requirements imposed on plaintiffs in typical litigation.[189] The disagreement and confusion over the prerequisites or foundational facts and a resulting loss of confidence in the presumption raised by the analysis are characteristics that the *McDonnell Douglas* pretext framework shares with res ipsa, as will be developed later.[190]

b. Uncertainty regarding the procedural effect of res ipsa

Another troublesome feature of res ipsa that also is suffered by *McDonnell Douglas* is, if it is applicable to a claim, its procedural effects are unclear. Some jurisdictions interpret res ipsa as creating a permissible inference of breach, while others have held that it has the more significant procedural effect of creating a rebuttable

184. *See* RESTATEMENT (SECOND) OF TORTS § 328D (1965) (listing three prerequisites).
185. *See supra* text accompanying note 183. The Restatement (Third) rejected two other versions, although these versions are accepted by some courts.
186. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 17 cmt. b.
187. *Id.*
188. *Id.*
189. *See supra* notes 162–65 and accompanying text.
190. *See infra* Part II.C.2(a)(i).

presumption of breach.[191] A majority of courts have adopted the view that res ipsa gives rise to a permissible inference of breach.[192] Even in those jurisdictions, however, the evidence may be such in exceptional cases that no reasonable fact finder could find that the defendant did not breach.[193] A minority of jurisdictions, by case law or statute, accord the greater effect of rebuttable presumption.[194] Still other jurisdictions seem to use "permissible inference" and "rebuttable presumption" interchangeably, not carefully distinguishing the difference in procedural effect.[195] The New York Court of Appeals acknowledged the tendency of courts to use the terms interchangeably and explained that courts in that state "have grown more sensitive to the differences between inferences and presumptions, recognizing that terminology can carry varying procedural implications."[196]

A third vexing aspect of res ipsa that it shares with *McDonnell Douglas* is the uncertainty regarding the types of cases to which it is applicable. Because res ipsa is considered a rule or principle regarding circumstantial evidence, some authorities and courts reject the applicability of res ipsa in cases in which direct evidence of breach is presented or available.[197] This distinction, however, is based on the much-maligned and ill-defined distinction between circumstantial and direct evidence.[198]

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191. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 17 cmt. j (distinguishing the jurisdictional split in the effect of res ipsa).

192. *Id.* § 17 cmt. j.

193. *See id.* (identifying the minority approach); *see also* Ryan v. Fast Lane, Inc., 360 S.W.3d 787, 790 (Ky. Ct. App. 2012) (exemplifying the minority approach to res ipsa).

194. *See, e.g.*, TENN. CODE ANN. 29-6-115(c) (2012); Kendrick v. Pippin, 252 P.3d 1052 (Colo. 2011) (employing the rebuttable presumption standard).

195. *See, e.g.*, Morejon v. Rais Const. Co., 851 N.E.2d 1143, 1146–48 (N.Y. 2006) (highlighting the various standards of res ipsa used by courts and the tendency to conflate the standards).

196. *Id.* at 1147; *see also* Alan W. Stewart, Note, *Are We Allowing the Thing to Speak for Itself?* Linnear v. CenterPoint Energy *and Res Ipsa Loquitur in Louisiana*, 71 LA. L. REV. 1091, 1099 (2011) (explaining that the uncertainty regarding presumption or inference was "most likely due to a careless interchanging of the two words by judges").

197. *See* Linnear v. CenterPoint Energy Entex/Reliant Energy, 966 So. 2d 36, 41–42 (La. 2007) (reversing the appellate court after it applied res ipsa despite the fact that direct evidence was presented); B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co., 596 A.2d 640, 647 (Md. 1991) (affirming the trial and appellate courts' decisions not to submit the theory of res ipsa to the jury); Stahlecker v. Ford Motor Co., 667 N.W.2d 244, 252 (Neb. 2003) (finding the doctrine of res ipsa inapplicable to the case at hand).

198. This is true both as a principle of evidence generally, and as applied to employment discrimination law specifically. Regarding the general principle, consider the following observations:

> The problem with the direct-circumstantial distinction is not simply that common beliefs about the significance of the distinction are false. A more

The foregoing three problems, uncertainties, or controversies regarding res ipsa loquitur lead to an overarching characteristic of res ipsa loquitur that it shares with its sibling *McDonnell Douglas*—given its nebulous nature, reticence of courts to ease the usual litigation burdens of plaintiffs without justification, and the skepticism about the inference or presumption to be drawn based on surrogate questions (substitutes for whether the defendant committed a breach of the standard of care)—the doctrine is more trouble than it is worth. Consequently, authorities sometimes attempt to limit the applicability and influence of res ipsa, but it has a dogged tenacity and perseverance, as indicated by its pervasive acceptance and its survival in the Restatement (Third). Its unwillingness to succumb, notwithstanding its many failings, is another thing it shares with *McDonnell Douglas*.

Linnear v. Centerpoint Energy Entex/Reliant Energy[199] demonstrates some of the predominant problems with res ipsa. The Louisiana Supreme Court had defined and refined res ipsa in several decisions before *Linnear*.[200] The principles announced in *Linnear* marked a significant limitation on the use of res ipsa.[201] The plaintiffs, wife and husband, sued for injury of the wife, who fell on her property and injured her leg.[202] They sued a company that recently had replaced a gas line on their property.[203] She sued for negligence in filling the

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> fundamental problem is that the distinction, while perhaps appealing on the level of intuition, makes no logical sense. There simply is no category of evidence that brings us into direct contact with crucial facts because no such contact is possible. All facts are a function of interpretation, and this unavoidability of interpretation makes all facts a matter of inference and all evidence, whether called "direct" or "circumstantial," nothing more or less than a contribution to that inferential process.

Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 HOUS. L. REV. 1801, 1804 (2009); *see also* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1658 n.220 (2011) [hereinafter Sullivan, *Plausibly Pleading*] (citing 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 24, at 945 n.5 (Peter Tillers ed., 1983) (concluding there is no clear distinction between direct and circumstantial evidence)). Regarding the distinction in the employment discrimination context, the Court in *Desert Palace, Inc. v. Costa* made the unimportance of distinguishing between direct and circumstantial evidence a linchpin of its decision. 539 U.S. 90, 99–100 (2003).

199. 966 So. 2d 36 (La. 2007).

200. Stewart, *supra* note 196, at 1095 (stating that since its recognition in a case in 1899, "Louisiana courts have continuously developed the doctrine, but . . . they experienced significant confusion about the requirements for the doctrine's applicability and its effects").

201. *See Linnear*, 966 So. 2d at 43 (noting the lower court's misapplication of res ipsa).

202. *Id.* at 38.

203. *Id.*

trench and sodding the area after replacing the gas line.[204] The company produced the testimony of two employees who worked on the project, who described in detail how the filling and re-sodding was done.[205] The plaintiffs introduced the testimony of the wife regarding the fall and photographs of the area where the woman fell.[206] The trial court rejected the plaintiff's request for a res ipsa jury instruction, and the jury returned a verdict for the defendant.[207] The appellate court reversed, holding that the trial court committed reversible error by not giving a res ipsa instruction and, conducting a de novo review, held that the defendant was negligent.[208]

The Louisiana Supreme Court reversed, explaining that it had long held that res ipsa should be applied sparingly[209] and imposing two significant limitations on the applicability of the doctrine.[210] First, the court held that it "only applies where direct evidence of defendant's negligence is not available to assist the plaintiff to present a prima facie case of negligence."[211] The court explained that in the case before it direct evidence was not only available, but presented and considered.[212] Second, the court stated the three predicate criteria[213] and held that a judge may give a res ipsa instruction only if the judge concludes that reasonable minds could differ on all three of those facts.[214] Considering these two holdings, a commentator concluded that the Louisiana court had narrowed the applicability of res ipsa.[215] Moreover, given that all a plaintiff obtains procedurally from a res ipsa instruction in Louisiana is a permissible inference of breach, that commentator concluded that plaintiffs would be better off without res ipsa, as obvious breaches would speak for themselves without Latin.[216]

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204. *Id.* at 38–39.
205. *Id.* at 39.
206. *Id.* at 39–40.
207. *Id.* at 40.
208. *Id.* at 40–41.
209. *Id.* at 44.
210. *See infra* notes 211–14 and accompanying text (describing the limited situations in which res ipsa is appropriate).
211. *Linnear*, 966 So. 2d at 42.
212. *Id.* One troubling aspect of this holding is that it does not specify which party or parties must have access to direct evidence. The court characterized the evidence as "competing direct evidence," *id.*, but that does not seem correct. Only the defendant had evidence that might be described as direct.
213. Although the Louisiana courts have varied in their statements, the court in *Linnear* listed them as follows: (1) injury is of type that ordinarily does not occur without negligence; (2) evidence sufficiently eliminates other more probable causes; and (3) alleged negligence is within scope of defendant's duty to plaintiff. *Id.* at 44.
214. *Id.*
215. Stewart, *supra* note 196, at 1106–09.
216. *Id.* at 1110.

B. McDonnell Douglas *Pretext Analysis: Preventing Discrimination from Speaking for Itself*

The *McDonnell Douglas* pretext analysis is a barely modified version of res ipsa loquitur, and it suffers from some of the same problems. The three-stage framework with shifting burdens of production is well-worn and well-known.[217] The first stage of the framework is for the plaintiff to satisfy the burden of production on four predicate criteria: (1) plaintiff is protected by the applicable employment discrimination statute; (2) she applied for a job for which she was qualified; (3) she was not hired; and (4) the position remained open and the employer continued to seek applicants with qualifications like those of plaintiff.[218] The Supreme Court also explained in the *McDonnell Douglas* opinion itself,[219] and then later in *McDonald v. Santa Fe Trail Transportation Co.*,[220] that the elements of the prima facie case may vary depending upon the facts; that qualification will be addressed more fully later.[221] If the plaintiff satisfies the burden of production on the prima facie case, and plaintiffs usually do because so little is required,[222] the plaintiff enjoys a rebuttable presumption of discrimination, and the burden of production shifts to the defendant employer to produce sufficient evidence of a "legitimate, nondiscriminatory reason" for the adverse employment action.[223] If the employer satisfies its burden of production at stage two, and employers almost always do,[224] the burden or production shifts back

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217. In *McDonnell Douglas*, an African American former employee sued his employer for discriminatory employment practices when the employer laid him off and would not subsequently re-hire him because of his participation in the Civil Rights Movement. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973). To evaluate the complainant's claim, the Supreme Court articulated a test that first gives the plaintiff the burden of showing a prima facie case of racial discrimination, and then shifts the burden to the employer to provide "some legitimate, nondiscriminatory reason" for rejecting the employee. *Id.* at 802. Once this is done, the plaintiff bears the ultimate burden of persuasion in proving the employer's alleged reason for the adverse employment decision is pretextual and its actual reason is discriminatory. *Id.* at 804.

218. *Id.* at 802.

219. *Id.* at 802 n.13.

220. 427 U.S. 273, 279 n.6 (1976).

221. For further discussion, see *infra* notes 235–40 and accompanying text.

222. Plaintiffs easily satisfy the burden of production. *See, e.g.*, Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 927 (2005) [hereinafter Sullivan, *Disparate Impact]* (observing that "the first step of *McDonnell Douglas*, the prima facie case, has always required little proof").

223. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

224. Defendants rarely have trouble satisfying the burden at this stage, either. Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 665 (1998); *see also* Sullivan, *Disparate Impact*, *supra* note 222, at 928 ("The requirements the defendant must meet are thus minimal: first, the nondiscriminatory reason must be put into

to the plaintiff to prove that the defendant's reason is pretextual.[225] The burden of persuasion on the ultimate issue of discrimination remains with the plaintiff.[226] If the plaintiff proves pretext, then the fact finder may find, but is not required to find, that the employer discriminated.[227]

Although some have recognized the pretext analysis as a barely modified version of res ipsa loquitur and the *McDonnell Douglas* framework have a lot in common, the Supreme Court has never identified it as such. So let us unveil *McDonnell Douglas* as a mere pretext for res ipsa. First, both are treatments, rules, or doctrines regarding use of circumstantial evidence, ascribing procedural consequences to the production of circumstantial evidence regarding certain issues. As noted above, res ipsa loquitur often has been called a rule or doctrine regarding circumstantial evidence.[228] The Supreme Court made clear early on that the *McDonnell Douglas* pretext framework was designed to analyze cases involving circumstantial evidence of employment discrimination.[229]

A second similarity is the significance and function of the predicate facts. In order for res ipsa to apply to a case, certain prerequisites or predicate facts must be established.[230] This is true, too, of the pretext analysis. In *Furnco Construction Corp. v. Waters*,[231] the Supreme Court explained the reason that the predicate facts in the analysis justified a presumption of discrimination:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not

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evidence and not just argued and second, the nondiscriminatory reason must not be too vague, as some courts have rejected nondiscriminatory reasons for vagueness.").

225. *Burdine*, 450 U.S. at 256.

226. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993) (citing *Burdine*, 450 U.S. at 256).

227. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); *Hicks*, 509 U.S. at 509–10.

228. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 17 cmt. a (2010).

229. The Court explained the rationale for according the circumstantial evidence procedural significance in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). In dissenting opinions, the Court has recognized that the pretext analysis manipulates circumstantial evidence. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 584 (2007) (Stevens, J., dissenting); *Hicks*, 509 U.S. at 536 (1993) (Souter, J., dissenting).

230. *See supra* Part II.A.2 (discussing the role of the predicate facts).

231. 438 U.S. 567 (1978).

> people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.[232]

Despite the similarities between res ipsa and the *McDonnell Douglas* analysis regarding predicate facts, there is one respect in which the analyses differ. In the tort doctrine, the plaintiff bears the burden of establishing all of the prerequisites for the applicability of res ipsa, whereas in the pretext analysis, the burden of production shifts between the plaintiff and the defendant. The divided burden in the pretext analysis means that the defendant must first provide a reason for the adverse employment action before the plaintiff can attack that reason as pretextual.[233]

A third similarity between res ipsa and pretext is the variability of the predicates that must be established for application.[234] The Supreme Court explained that the elements of the *McDonnell Douglas* prima facie case vary depending on the facts.[235] In most cases, the variation in elements occurs because the adverse employment action differs from the refusal to rehire at issue in *McDonnell Douglas*.[236] As Professor Sullivan has observed, "the famous four prongs of the prima facie case were tailored to the relatively unusual facts before the Court, namely an employer's refusal to rehire a qualified black former employee when the job in question remained vacant."[237] For example, the elements are varied where the complained-of adverse employment action is a reduction in force.[238] Moreover, some courts vary the basic *McDonnell Douglas* prima facie case when the claim is one of so-called "reverse discrimination," in which the plaintiff is not a member of a class that historically has not suffered much

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232. *Id.* at 577 (emphasis in original) (citation omitted).

233. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (requiring the lower court to give the respondent an opportunity to show that petitioner's stated reason for the adverse employment action was pretextual).

234. The different elements that have been required for res ipsa are detailed above. *See supra* Part II.A.2 (laying out the requirements for a plaintiff's res ipsa claim).

235. *McDonnell Douglas*, 411 U.S. at 802 n.13.

236. *See id.* at 796 (alleging that, after the employee was laid-off, the employer failed to re-hire plaintiff for race reasons).

237. Sullivan, *Disparate Impact*, *supra* note 222, at 926.

238. *See Developments in the Law—Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579, 1587–88 (1996) (discussing variation on the prima facie case when the plaintiff cannot be immediately compared to another employee).

discrimination, such as Caucasians or men.[239] Some courts have varied the prima facie case in reverse discrimination cases, imposing an additional requirement on a plaintiff to produce evidence of "background circumstances" suggesting that the employer is an unusual employer that would be likely to discriminate against a member of a class that historically has not suffered substantial employment discrimination.[240]

A fourth similarity, and one that is particularly important to this topic, is the procedural effect accorded the circumstantial evidence under res ipsa and *McDonnell Douglas*.[241] As discussed above, some jurisdictions at various times have accorded res ipsa the effect of a rebuttable presumption that a breach occurred, but most give it the effect of a permissible inference.[242] The procedural effect of a plaintiff satisfying her burdens of production in the pretext analysis has been the subject of several Supreme Court decisions, culminating with *Reeves v. Sanderson Plumbing Products, Inc.*[243] It is now well established that if a plaintiff satisfies the burdens of production on the prima facie case and pretext, the fact finder may, but is not required, to infer that the defendant employer illegally discriminated.[244]

A final similarity between res ipsa and the pretext analysis is the uncertainty regarding the type of cases to which they apply. For res ipsa, a couple of questions arise: (1) Does it apply to cases in which a plaintiff attempts to prove a specific breach, but also pleads res ipsa

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239. *See* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1035–36 (2004) [hereinafter Sullivan, *Circling*] (explaining the differences between "traditional" discrimination and reverse discrimination).

240. *See, e.g.*, Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997), *abrogated by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981). *See generally* Sullivan, *Circling*, *supra* note 239, at 1065–71 (discussing courts' opinions and logic surrounding background circumstances and noting that the term "background circumstances" is "amorphous"); Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test To Ensure That Separate Is Equal*, 49 EMORY L.J. 993, 1001–11 (2000); Donald T. Kramer, Annotation, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Private Employment Cases*, 150 A.L.R. FED. 1, 27 (1998).

241. *See* Okediji, *supra* note 25, at 85 (stating that "[t]he procedural effect of res ipsa loquitur has been as troublesome in the practice of tort law as the Title VII *McDonnell Douglas-Burdine* framework has been in the practice of employment discrimination law").

242. *Supra* notes 192–96 and accompanying text.

243. 530 U.S. 133 (2000).

244. *Id.* at 147–48 (holding that if a plaintiff bears her burden, there is a permissible inference at summary judgment and judgment as a matter of law stages); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

and seeks a res ipsa jury instruction in the alternative?; (2) Does it apply to cases in which direct evidence is introduced, and if it is not applicable in such cases, does such inapplicability depend on which party introduced the direct evidence? A very difficult and pivotal issue imbedded in those questions is how a court should distinguish between direct and circumstantial evidence. As for the pretext analysis, Justice O'Connor's concurring opinion in *Price Waterhouse* was the origin of the dividing line that the *McDonnell Douglas* analysis applied to cases involving circumstantial evidence but not to cases involving direct evidence, to which the mixed-motives analysis, originally developed in *Price Waterhouse*, applied.[245] However, after Congress modified and codified the mixed-motives analysis in the Civil Rights Act of 1991, the Supreme Court decided in *Desert Palace, Inc. v. Costa*,[246] based on the language of the statutory change, that the mixed-motives analysis is not restricted to cases in which direct evidence of discrimination is produced.[247] Now, there is great uncertainty and confusion about the types of cases to which the *McDonnell Douglas* analysis applies.[248]

In sum, the similarities between res ipsa loquitur and the *McDonnell Douglas* pretext analysis and the problems they share are striking. The most significant difference between the *McDonnell Douglas* proof structure and res ipsa is the shifting burdens of production under *McDonnell Douglas*, along with the fact that the plaintiff does enjoy a rebuttable presumption of discrimination after establishing a prima facie case. This is an insignificant distinction, however, because almost every defendant employer rebuts that presumption by producing evidence of a legitimate, nondiscriminatory reason.[249]

245. *See supra* Part I.D.
246. 539 U.S. 90 (2003).
247. *Id.* at 101–02.
248. *See* Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004) (concluding that lower courts need guidance from the Supreme Court on how to decide disparate treatment cases); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004) (noting that not only is there disagreement about what constitutes direct evidence, but also that when the Court attempted to resolve this issue in *Desert Palace*, it failed to even mention *McDonnell Douglas*, creating additional confusion); Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 ABA J. LAB. & EMP. L. 461, 464–65 (2011); Sullivan, *Plausibly Pleading*, *supra* note 198, at 1650–51 (describing the inconsistent ways that *McDonnell Douglas* is applied, if at all).
249. Miles v. M.N.C. Corp., 750 F.2d 867, 870 (11th Cir. 1985); George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1474 (1992) (book review) ("The fact that the plaintiff has made out a prima facie case in *McDonnell Douglas* usually is of no consequence because the plaintiff's burden of making out that case, and the defendant's rebuttal burden of showing a 'legitimate nondiscriminatory' reason, are so easily satisfied. Almost all individual cases under

Moreover, the shifting burden is merely a burden of production, unlike the mixed-motives analysis in which the burden of persuasion shifts.[250] Although res ipsa does not impose shifting burdens of production, in reality defendants do produce evidence to attempt to rebut both the prerequisites for application of res ipsa and the ultimate issue of a breach by the defendant. Ultimately, then, both res ipsa and *McDonnell Douglas* give plaintiffs the advantage of a permissive inference—permitting, but not compelling, the fact finder to infer breach or employment discrimination, respectively. In summary, *McDonnell Douglas* looks like res ipsa, performs like it, and shares its problems.

If the *McDonnell Douglas* analysis is essentially res ipsa loquitur, why did the Supreme Court not identify it as such? As discussed earlier, the Court has clearly declared in several employment discrimination cases, including *Staub* most recently, that it was borrowing from tort law. A few possible answers occur. First, perhaps the Court did not realize that it was importing res ipsa into employment discrimination law. Second, maybe the Court realized that it was importing res ipsa, but it did not think it important to say that it was doing so. Third, *McDonnell Douglas* was one of the earliest Title VII cases decided by the Supreme Court, and the notion that Title VII was merely a statutory tort or that tort law could be adopted to do the work of a civil rights and public policy statute might have been surprising or controversial in 1973. Regardless of why the Court did not identify the pretext analysis as largely unexpurgated tort law, the exposure of it as such prompts three questions: (1) What other options did the court have?; (2) Was it appropriate to import res ipsa as the most fundamental analysis in employment discrimination law?; and (3) Regardless of the propriety at the time of adoption, is it appropriate to retain it today? The questions and answers are related and are treated together in the next Section.

McDonnell Douglas come down to a determination whether the plaintiff has proved that the 'legitimate, nondiscriminatory reason' offered by the defendant is really a pretext for discrimination.").

250. *See supra* Part I.D (discussing the evolution of the mixed-motives analysis and the requirements that fall upon each party).

C. The Appropriateness of Res Ipsa Loquitur for Employment Discrimination Law

1. In the beginning—forty years ago the Court adopted the pretext framework

Whether the Supreme Court should have adopted, and only slightly modified, res ipsa loquitur as the basic analysis for the most common type of employment discrimination claim—individual disparate treatment—depends in part on the existing alternatives. Much of the *McDonnell Douglas* opinion is hard to understand if one does not see it as the Court's effort to explain why the innovative employment discrimination law theory it approved in *Griggs v. Duke Power Co.*—disparate impact—did not apply to the type of claim presented in *McDonnell Douglas*.[251] The Court explained that the court of appeals had committed error in rejecting the employer's given reason for not rehiring the employee-plaintiff.[252] The Court further explained that the lower court had relied on *Griggs* for the position that exclusionary employment practices that cannot be justified by their relation to job performance violate Title VII.[253] The Court then declared that Green appeared "in different clothing," and the expansive principles embodied in the disparate impact theory of *Griggs* did not apply to his claim.[254] Instead, if Green could not disprove as pretextual the employer's reason for not rehiring him—that he engaged in an unlawful stall-in—he would lose.[255] This approach was necessary, the Court explained, to accommodate the "societal as well as personal interests on both sides of this equation . . . [,] [t]he broad, overriding interest, shared by employer, employee, and consumer" in "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[256]

Thus, without invoking the term, the Court adopted a barely modified version of res ipsa loquitur. The Court later would make the res ipsa roots clear when, in *Furnco*, it explained the justification for the pretext analysis: if the most common reasons for an adverse employment action are eliminated through the three stages of the

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251. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805–06 (1973).
252. *Id.* at 805–06 (pointing out that even though the employee's behavior was not directly related to his qualifications for the job, it could still constitute a "legitimate, nondiscriminatory" reason for the employer to refrain from re-hiring him).
253. *Id.*
254. *Id.* at 806.
255. *Id.* at 805.
256. *Id.* at 801.

pretext analysis, then discrimination more likely than not is the reason for the action.[257] So, the Court adopted res ipsa in *McDonnell Douglas* rather than creating new law as it had in *Griggs*. According to the Court's rationale in *McDonnell Douglas*, this res ipsa analysis accommodated the competing and shared interests of employers, employees, and consumers.[258] Furthermore, as the Court explained more fully in *Furnco*, the rationale supporting res ipsa in tort law also fit the context of intentional discrimination analysis: if certain predicate facts could be established, then discrimination was a more-probable-than-not explanation of the adverse employment action at issue, just as breach is a likely cause of the damages in a negligence case if the res ipsa foundational facts can be established.[259] Moreover, as Justice O'Connor would explain in her concurring opinion in *Price Waterhouse* sixteen years after the *McDonnell Douglas* framework was unveiled: "[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."[260] Thus, as with res ipsa, the pretext framework was a tool bestowed on plaintiffs to help them marshal circumstantial evidence to present a case of intentional discrimination.[261]

Should the Court in *McDonnell Douglas* have adopted res ipsa as the analysis for individual disparate treatment claims? It is difficult to determine now whether the Court in 1973 made a good decision, but the balancing of interests and rejection of *Griggs* articulated in *McDonnell Douglas*, and the post-hoc explanation of the analysis under the res ipsa rationale by the Court in *Furnco* and Justice O'Connor's concurring opinion in *Price Waterhouse* are well reasoned and persuasive. If the Court believed that employment discrimination was common enough that judges were willing to infer discrimination from a flimsy prima facie case and a showing of pretext, then res ipsa should have functioned well enough in helping plaintiffs present cases based on circumstantial evidence.[262] Over time, however, the

257. 438 U.S. 567, 577 (1978).
258. *McDonnell Douglas*, 411 U.S. at 801.
259. *See Furnco*, 438 U.S. at 577 (asserting that people do not act arbitrarily in these business situations).
260. Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring in the judgment).
261. *See id.* (finding that this framework would not be appropriate when direct evidence is available).
262. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (noting that a plaintiff's presentation of circumstantial evidence can be "quite persuasive").

shortcomings of using res ipsa as the basic analysis increasingly began to show, and the utter failure now should be apparent.

*2. Forty years of using res ipsa/*McDonnell Douglas *pretext demonstrates the need for change*

Even if the Court's 1973 adoption of res ipsa in employment discrimination law was a good, or at least reasonable, decision at the time, the experience with it over forty years yields a dramatically different assessment of the decision to cling to it now. The chinks in the armor have been many, and cumulatively they render indefensible the maintenance of res ipsa in employment discrimination law. This section addresses two specific developments and one overarching theme that render maintenance of the "res ipsa *McDonnell Douglas*" regime untenable now.

a. Two specific developments in the use of the McDonnell Douglas *analysis*

i. Enervation of the prima facie case and pretext

From 1973–2003, the Supreme Court worked with the *McDonnell Douglas* framework, trying to explain its substantive and procedural meaning, striving to bolster its weak prima facie case, and attempting to retain sufficient flexibility in both the first (prima facie case) and third (pretext) stages in order to make the analysis workable in various factual scenarios. The lower courts in turn have worked with what the Supreme Court has given them, and the result has been confusing; but for a high tolerance of the courts to work through uncertainties and vagaries,[263] the result could be close to chaotic.[264] The Court early on began working with the analysis, explaining that variations in the prima facie case would be necessary and explaining the substantive meaning and procedural effects of the second and third stages of the analysis. The fact that the Supreme Court and the lower courts have spent so much time tinkering with the proof

263. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–76 (2009) (holding that the mixed-motives analysis does not apply to age discrimination claims under the ADEA and the "because of" statutory language in the ADEA means but-for causation); Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003) (holding that direct evidence is not required to invoke the "motivating factor" statutory standard inserted in Title VII by the Civil Rights Act of 1991).

264. In its decision in *Desert Palace*, the Ninth Circuit used the terms "a quagmire," a "morass," and "chaos" to describe the state of the law on disparate treatment proof structures. Costa v. Desert Palace, Inc., 299 F.3d 838, 851–53 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003). The Ninth Circuit's assessment predated the Supreme Court's decisions in *Desert Palace* and *Gross*, which have exacerbated the chaos.

structure rather than addressing questions about discrimination—which are sufficiently numerous, complex, and important in their own right—is indicative of the failure of this res ipsa analysis.[265] Ultimately, neither the efforts to adjust and fortify the prima face case nor the explication of the pretext stage have proven efficacious in maintaining a generally applicable, useful, comprehensible, palatable, and flexible analysis.

First, the Court began working to explain and repair problems in the prima facie case soon after it was announced. The Court in *McDonnell Douglas* itself reserved the possibility that the elements of the prima facie case might change depending on the factual situation.[266] The Court reiterated that idea in the course of holding that the framework applied to a reverse discrimination case in *Santa Fe Trail*.[267] As courts applied the pretext analysis to subsequent reverse discrimination cases, however, the ill fit between res ipsa analysis and reverse discrimination cases would become obvious.[268]

After *Santa Fe Trail*, the Court continued to struggle with problems raised by the prima facie case. In *Texas Department of Community Affairs v. Burdine*,[269] the Court was confronted with the issue of the ease with which virtually any minimally qualified plaintiff could satisfy the prima facie case and thus achieve a rebuttable presumption of discrimination.[270] The Court responded by "slipping in" an additional statement about the prima facie case, which Professor Malamud labeled a "stealth requirement," inserted to assuage concerns of some justices that the prima facie case was not sufficiently demanding.[271] The Court's final opinion noted that the plaintiff's

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265. *See, e.g.*, Sperino, *Rethinking*, *supra* note 4, at 81 ("[T]he use of the frameworks often creates questions that might not otherwise arise—because the questions are about the frameworks themselves, rather than about the substantive discrimination inquiry."); *id.* at 105 ("After a framework is created, courts often funnel their discrimination inquiries through this typology, rather than through the statutory language. Like the prisoners in the allegory of the cave, courts (and litigants) begin to review discrimination based on a shadow of reality.").

266. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

267. *See* 427 U.S. 273 (1976).

268. *See supra* notes 239–40; *infra* notes 313–28 and accompanying text (discussing the challenges of applying the pretext analysis to the fact patterns that deviate from traditional discrimination cases and providing examples of those situations).

269. 450 U.S. 248 (1981).

270. *Id.* at 253.

271. *See* Malamud, *supra* note 23, at 2246–54 (shedding light on the Court's decision-making considerations and noting various justices' concerns with plaintiffs' light burden in the *McDonnel Douglas* framework).

burden is not "onerous," and added the "stealth requirement" that the prima facie case requires the plaintiff to prove "by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under the circumstances which give rise to an inference of unlawful discrimination*."[272] Although the stealth requirement has not often been repeated or seemed to make a difference in many cases since *Burdine*,[273] it demonstrates that the Court recognized the weakness of the *McDonnell Douglas* prima facie case fewer than ten years after it announced the proof structure, and it wavered from the res ipsa-based rationale it articulated in *Furnco*. Like res ipsa, the *McDonnell Douglas* framework shares an uncertain and changing prima facie case.[274]

Although the Supreme Court has not addressed the issue again since its 1976 decision in *Santa Fe Trail*, the inadequacy of the prima facie case has been particularly evident and vexatious in reverse discrimination cases in the lower courts.[275] The *McDonnell Douglas* analysis does not function reasonably in such cases without an adjustment, and that adjustment is one which flouts the equal treatment foundation of employment discrimination law. It should not be surprising that the unadjusted prima facie case does not function well in reverse discrimination cases in view of the Court's explanation in *Furnco*. In *Furnco*, the Court articulated its res ipsa rationale for the permissive inference arising from a plaintiff's successful navigation of *McDonnell Douglas*. The rationale is based in the idea that employment discrimination is fairly common and the prima facie case eliminates the two most common nondiscriminatory reasons for adverse employment actions. Thus, if an adverse employment action remains unexplained by the employer (because the plaintiff has proven the employer's proffered reason to be pretextual), then discrimination is more likely than not the explanation. In reverse discrimination cases, the foregoing formulation does not work because reverse discrimination has not been commonly practiced historically.[276] Accordingly, some courts

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272. *Burdine*, 450 U.S. at 253 (emphasis added).

273. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (failing to mention the language of the stealth requirement).

274. *See supra* Part II.A.2.

275. *See infra* notes 313–28 and accompanying text (describing the challenging fact patterns in Smith v. Lockheed-Martin Corp., 644 F.3d 1321 (11th Cir. 2011), and in Burlington v. News Corp., 759 F. Supp. 2d 580 (E.D. Pa. 2010)).

276. *See* Sperino, *Rethinking*, *supra* note 4, at 78–79 (noting that "some courts began doubting that the inferences created by *McDonnell Douglas* made sense in

have required that a plaintiff in a reverse discrimination case prove something additional to establish a prima facie case—background circumstances showing that the employer at issue is one which would be likely to engage in this historically uncommon type of discrimination.[277] However, other courts object to imposing the additional requirement in the prima facie case,[278] with some of those courts reasoning that to do so would violate an important theoretical foundation of employment discrimination law—equal treatment of similarly situated persons.[279]

Thus, the prima facie case stage of *McDonnell Douglas* has proven to be too weak of a basis to support a rebuttable presumption of discrimination and to be inadequately flexible to address various types of cases. Similarly, the predicate facts of res ipsa loquitur, on which the inference of breach is founded, have been undermined, challenged, and revised.

In addition to the facts constituting the prima facie case, the other predicate fact upon which *Furnco* based the inference of discrimination was the plaintiff's production of sufficient evidence that the employer's proffered legitimate, nondiscriminatory reason was pretextual. Over the years, the Court has wavered in its conviction about the inference to be drawn from that predicate fact, as the debate spanned decades and two Supreme Court decisions.[280] As with the prima facie case, the Supreme Court has spent its resources, as well as those of the lower courts and litigants,

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reverse discrimination cases, where the plaintiff was not a member of a historically discriminated against group").

277. *See, e.g.*, Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997) (noting that being a minority is enough to suggest discrimination, but being a historically non-discriminated-against person requires more); Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (finding that it makes no sense in contemporary society to infer majority discrimination in the same manner as minority discrimination).

278. *See, e.g.*, Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999) (rejecting the background circumstances factor because all that is required is a showing that "the employer is treating some people less favorably than others based upon a trait that is protected under Title VII"); Lind v. City of Battle Creek, 681 N.W.2d 334, 335 (Mich. 2004) (overruling a prior decision that used the background circumstances requirement because it clearly conflicted with the state's civil rights laws).

279. *See, e.g.*, Clements v. Barden Miss. Gaming, L.L.C., 373 F. Supp. 2d 653, 667–68 (N.D. Miss. 2004) (calling the background circumstances requirement "illogical and even dangerous"); *Lind*, 681 N.W.2d at 335 (stating that "'individual' means 'individual'").

280. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (holding that, on a motion for judgment as a matter of law, a plaintiff is not required to go beyond proof of the prima facie case and pretext in order for the fact finder to infer discrimination); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that, for a final judgment, a fact finder may—but is not required to—infer discrimination from evidence showing the employer's given reasons are false).

interpreting the meaning of the "res ipsa *McDonnell Douglas*" framework, rather than addressing questions about the ultimate issue of employment discrimination.[281] Termed pretext-plus versus pretext-only,[282] the primary issue in the debate was determining the procedural effect of a plaintiff's introducing sufficient evidence of pretext at stage three.

The Court addressed the effect of proving pretext vis-à-vis two burdens that the plaintiff bears: persuasion and production. First, the Court addressed the burden of persuasion in 1993 in *St. Mary's Honor Center v. Hicks*,[283] wherein the Court held that proving pretext permits, but does not require, the fact finder to infer discrimination.[284] While many civil rights advocates and commentators were chagrined by the holding in *Hicks*, it was consistent with the procedural effect generally accorded to res ipsa in tort law, although some courts and jurisdictions accord res ipsa a stronger effect.[285] Realistically, not much more could be expected from an analysis in which the Court already had shown a significant lack of confidence.

The Court considered the procedural effect of pretext in the context of the burden of production in 2000 in *Reeves*.[286] The Court considered whether sufficient evidence of pretext would enable a plaintiff to survive a challenge to sufficiency of the evidence (summary judgment or judgment as a matter of law).[287] The Court held that proving pretext may permit the trier of fact to conclude that the employer discriminated, although the Court would not state

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281. *See supra* note 265 and accompanying text (explaining that pretext analysis forces courts to scrutinize litigants' abilities to satisfy the elements of an ill-fitted framework, rather than encourage courts to apply antidiscrimination statutes to the particular facts of a case).

282. *See* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 65–66 (1991) (defining the pretext-only rule as requiring only evidence that the defendant lied about its discriminatory motivations, while defining the pretext-plus rule as requiring pretext and an actual showing of discriminatory intent).

283. 509 U.S. 502 (1993).

284. *Id.* at 511 (establishing the procedural effect of proving pretext as giving rise to a permissive inference of discrimination, rather than a rebuttable presumption).

285. *See supra* Part II.A.3 (explaining that the majority of jurisdictions interpret the procedural effect of res ipsa loquitur as creating a permissible inference of breach, but some courts view it as creating a rebuttable presumption). Many civil rights advocates and commentators were chagrined by the holding in *Hicks*. *See, e.g.*, Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 998, 1037–38 (1994) (chronicling the continued prevalence of discrimination in American society and criticizing the Supreme Court for placing an unfair burden on plaintiffs in *Hicks*).

286. 530 U.S. 133, 143 (2000).

287. *Id.* at 147–48.

that proof of pretext always will support such a conclusion.[288] So, once again in *Reeves*, the Court held that a plaintiff's successful navigation of the pretext analysis yields a permissive inference of discrimination at yet another procedural juncture.[289] However, the Court in *Reeves* suggested that the permissive inference is stronger at summary judgment and judgment as a matter of law than it is in *Hicks* at verdict or judgment.[290] Justice Ginsburg found this suggestion somewhat unsatisfactory.[291] In her concurring opinion in *Reeves*, she ruminated that the Court in the future might need to more precisely define circumstances that would require a plaintiff to submit evidence beyond a prima facie case and pretext.[292] Such circumstances, she anticipated, would be uncommon.[293]

Thus, the Supreme Court and lower courts have struggled with the procedural effect and substantive meaning of two stages of the three-part *McDonnell Douglas* analysis. As previously discussed above, these struggles are analogous to the uncertainties and discomforts courts have experienced with the prerequisite or predicate facts in res ipsa.[294] Ultimately what these struggles have demonstrated is that res ipsa was ill-suited to employment discrimination law, and the fit has become progressively worse since 1973. The Court and courts have spent substantial time and resources attempting to mitigate the problems with the framework, but they have failed.

ii. Creation of an alternative framework

The second development that has undermined whatever utility "res ipsa *McDonnell Douglas*" might have had is the Court's recognition that the pretext/res ipsa analysis would be inadequate to evaluate all types of individual disparate treatment claims. Consequently, the Court created the alternative mixed-motives analysis, which was, and is now, much better-suited than pretext/res ipsa to evaluating intentional discrimination. Soon after the Court created the mixed—motives analysis, Congress would codify a modified version of it. By creating the second framework and later eradicating the dividing line between the cases governed by each framework, the Supreme Court led employment discrimination jurisprudence into virtual chaos.

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288. *Id.* at 148.
289. *Id.*
290. *Id.*
291. *Id.* at 154–55 (Ginsburg, J., concurring).
292. *Id.*
293. *Id.*
294. *See supra* Parts II.A–B.

In *Price Waterhouse*, the Court acknowledged that "res ipsa *McDonnell Douglas*" was inadequate to address all types of individual disparate treatment cases.[295] In that case, the Court created what has come to be known as the mixed-motives analysis to analyze cases in which more than one motive causes the employer to take an adverse employment action.[296] Congress would later modify and codify the mixed-motives analysis in the Civil Rights Act of 1991, thus embedding the "motivating factor"[297] and same-decision defense[298] stages of the analysis in Title VII, although the effect of same-decision was changed to a limitation on remedies rather than a defense to liability. Faced with the question of which analysis to apply in any given case, the lower courts crafted a dividing line based on Justice O'Connor's *Price Waterhouse* concurrence, whereby *McDonnell Douglas* applied to claims proven by circumstantial evidence and mixed motives applied to claims supported by direct evidence.[299]

In 2003, the Supreme Court erased the line between *McDonnell Douglas* cases and mixed-motives cases in *Desert Palace*, holding that direct evidence is not necessary to obtain a "motivating factor" jury instruction under Title VII as amended by the Civil Rights Act of 1991.[300] Since the decision in *Desert Palace*, lower courts have had no guidance on how to decide which of the two analyses applies to any given case. This debate is akin to the issue in tort law of whether res

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295. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring in the judgment) (distinguishing *Price Waterhouse*, a "mixed-motives" case in which multiple factors may have motivated the adverse employment decision, from pretext cases like *McDonnell Douglas*, which involve discrimination driven by one "true" motive); *id.* at 270–71 (O'Connor, J., concurring in the judgment) (justifying a departure from the *McDonnell Douglas* framework when a plaintiff presents direct evidence that the employer relied substantially on factors forbidden under Title VII).

296. Under the now defunct *Price Waterhouse* mixed-motives analysis, the plaintiff bears the burden of showing that the employer's discrimination was partly motivated by an unlawful reason. If the plaintiff succeeds, the burden then shifts to the defendant to prove, by a preponderance of the evidence, that it would have made the same decision without relying on the unlawful reason. Only after carrying this burden could the defendant avoid a finding of liability. *Id.* at 258 (majority opinion); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003) (defining a "mixed-motive" case as involving both legitimate and illegitimate reasons for discrimination).

297. 42 U.S.C. § 2000e-2(m) (2006).

298. *Id.* § 2000e-5(g)(B).

299. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 851–54 (9th Cir. 2002) (highlighting the confusion among courts over the appropriate application of the *McDonnell Douglas* pretext analysis and *Price Waterhouse* mixed-motives analysis), *aff'd*, 539 U.S. 90 (2003); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 647 (2008) (tracing the dividing line between direct and circumstantial evidence—and thus mixed-motives and pretext analyses—to Justice O'Connor's concurrence in *Price Waterhouse*).

300. *Desert Palace*, 539 U.S. at 101 (lowering the bar from direct evidence to "sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence" that an unlawful motivation factored into an employer's decision making).

ipsa may be applied in cases in which direct evidence of breach/nonbreach is available.[301]

b. The overarching theme: A tool for plaintiffs becomes a straightjacket for litigants and a distraction from consideration of substantive discrimination issues

As the Supreme Court and lower courts have tinkered with the res ipsa analysis of employment discrimination law and created an alternative analysis to evaluate some undefined subset of individual disparate treatment claims, it has become increasingly clear that the *McDonnell Douglas* analysis has lost the positive aspects of res ipsa loquitur, while the negative characteristics of res ipsa have been replicated and exacerbated. The three-stage structure has become a shibboleth that courts dare not fail to recite, but all the while, courts remain unconvinced that a prima facie case and pretext sufficiently indicate discriminatory motivation.

The elements of the prima facie case and pretext, the stages of the pretext analysis on which the plaintiff bears the burden of production, are the analogues of the predicate facts for application of res ipsa. The *McDonnell Douglas* pretext analysis is not about whether discrimination occurred but about issues that may lead to an inference of discrimination.[302] The prima facie case, with its varying elements, is particularly weak and courts progressively have come to suspect that it indicates little about the ultimate issue of discrimination.[303] Thus, over its forty years, the res ipsa loquitur of employment discrimination law has become an exemplar of a phenomenon described by Professor Suzanna Sherry in which old and established legal doctrines seemingly change abruptly (analogized to earthquakes) when in reality what has occurred is that the foundational facts embedded within them and on which the

301. *See supra* Parts II.A.3.

302. The Supreme Court expressed the idea this way: "In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981); *see also* Sperino, *Rethinking*, *supra* note 4, at 94 (explaining that "[e]mbedded within the *McDonnell Douglas* inquiry are several sets of facts that masquerade as legal standards").

303. *See* Sherry, *supra* note 6, at 164 (explaining that plaintiffs are not required initially to prove discriminatory intent, but instead, intent is presumed from the four elements of the prima facie case because courts believe they give rise to an inference of discrimination); Sperino, *Discrimination Statutes*, *supra* note 7, at 14 (listing the four elements of proof required to establish a prima facie case: (1) that the plaintiff belonged to a racial minority; (2) that he applied for a job and was qualified; (3) that he was rejected; and (4) that the job remained open).

doctrines are based have changed over time (analogized to movement of the tectonic plates).[304] *Hicks* was an apparent "earthquake," which suggests that the Supreme Court actually had changed its belief about the foundational facts of the *McDonnell Douglas* analysis.[305] Professor Sherry posits that the Court might reasonably believe that with the passage of time since the enactment of the discrimination laws, it has become less likely that employers intentionally discriminate on prohibited bases.[306]

If the courts have little confidence that the predicate facts give rise to an inference of discrimination, then the res ipsa of employment discrimination law is no longer performing its function, and we would be better off simply addressing the issue of discrimination.[307] Still, the framework may serve a useful purpose because some courts will continue to believe the inference is reasonable in some cases—that is, *McDonnell Douglas* will continue to serve as a useful tool for some plaintiffs to marshal their circumstantial evidence.[308] However, the framework presents at least two other problems. First, it suffers not just from reduced usefulness as a tool, but it has become a hindrance, as courts recite it and require plaintiffs (and defendants) to try to fit their evidence into it no matter how their evidence may differ from the framework's prescribed elements. Thus, what the Supreme Court designed as a tool to help plaintiffs organize and present circumstantial evidence has become a straightjacket into which they must force their cases.[309] Second, the courts (as well as

304. Sherry, *supra* note 6, at 145–46.

305. *See id.* at 165–66 (attributing the change in law to the Court's shifting belief that discriminatory motives cannot be assumed to drive adverse employment decisions).

306. *Id.* at 164–65; *see also* Calloway, *supra* note 285, at 997–98, 1007–09 (observing that in *Hicks*, the Supreme Court questioned the basic assumption that discrimination is likely the reason behind adverse employment decisions); Okediji, *supra* note 25, at 52 (stating that *Hicks* "reflects the subtle, but increasingly palpable, societal conviction that race is no longer the problem that it once was at the time of Title VII's enactment").

307. *See* Sperino, *Rethinking*, *supra* note 4, at 71, 81 (advocating for courts to abandon the use of frameworks and directly address the substantive discrimination inquiry).

308. The *McDonnell Douglas* pretext analysis can aid plaintiffs in proving intentional discrimination using circumstantial evidence because the rationale for importing res ipsa loquitur into employment discrimination law would still apply in courts that continue to believe that unexplained adverse employment decisions commonly result from discrimination. *See supra* note 232 and accompanying text; *see also* Sperino, *Rethinking*, *supra* note 4, at 116 ("*McDonnell Douglas*'s core holding—that discrimination can be shown by establishing that the employer lied about the reason for its decision—could be an important supporting doctrine in some cases.").

309. *See* Okediji, *supra* note 25, at 52–53 (stating that *Hicks*'s version of pretext analysis "artificially constrains factfinding"); Sperino, *Rethinking*, *supra* note 4, at 71 ("[T]he key question in modern discrimination cases is often whether the plaintiff

commentators, litigants, employers, and others) view the proof structures as "the thing itself," rather than the shadow on the wall of the cave,[310] and an inordinate number of decisions and other resources are devoted to explicating, developing, and unraveling the proof structures.[311] Viewing employment discrimination law in such a distorted way inevitably stunts productive and innovative development of the law because courts and others do not see the need for reform as they focus on the framework as the manifestation of discrimination.[312]

Among the many problems with the *McDonnell Douglas* framework, it does not work well for discrimination cases that deviate substantially from the most common factual scenarios of discrimination.[313] Reverse discrimination cases, as previously discussed, do not fit well within res ipsa *McDonnell Douglas* because they do not involve historically common types of discrimination.[314] For example, in *Burlington v. News Corp.*,[315] a Caucasian news anchor was fired for causing substantial racial unrest in the workplace after using the word "nigger" in discussions in a meeting about whether the word should be used in a news report.[316] The Caucasian plaintiff contended that he was disciplined for a non-derogatory use of the word, while many black employees who also used the word were not disciplined.[317] The court recognized the threshold question of which analysis it should apply—the *McDonnell Douglas* pretext analysis or

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can cram his or her facts into a recognized structure and not whether the facts establish discrimination.").

310. In the allegory of the Cave, Plato discusses a hypothetical situation in which what someone perceives as reality is actually shadows cast on the wall of the cave by the true objects. *See* Corbett, *supra* note 25..

311. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (considering the procedural effect of proving pretext); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (same).

312. *See* Sperino, *Rethinking*, *supra* note 4, at 86 (asserting that "[s]ince the late 1980s . . . courts have largely failed to consider new ways of thinking about discrimination and have instead chosen to rely on the existing typology"); *cf.* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 47 (2006) (explaining that advocates of a structuralist approach to employment discrimination law could contend that the alternative may "remit workplace inequities to the increasingly outmoded tools of an employment discrimination law designed in the 1960s and based on a very different model of discrimination, of the workplace, and of regulation than that which prevails today").

313. *See* Sperino, *Discrimination Statutes*, *supra* note 7, at 15 (observing that "[i]n practice, *McDonnell Douglas* causes courts to focus on narrow visions of how discrimination happens and therefore makes it unlikely that a plaintiff trying to prevail on a strange scenario will survive the test").

314. *See supra* notes 239–40 and accompanying text.

315. 759 F. Supp. 2d 580 (E.D. Pa. 2010).

316. *Id.* at 584–89.

317. *Id.* at 592.

mixed-motives.[318] The court said it was using both analyses, but it posed the key question ostensibly under the pretext stage: "[C]an an employer be held liable under Title VII for enforcing or condoning the social norm that it is acceptable for African Americans to say 'nigger' but not whites?"[319] Thus, the court identified the core discrimination issue as one that actually had little to do with the *McDonnell Douglas* analysis, though the issue merited careful consideration and the court dutifully crammed it into the pretext stage.[320] Examining that issue, the court concluded that African Americans indeed might tolerate use of the word by other African Americans and be insulted when the word is used by white people.[321] Nevertheless, the court found that even if such a social norm exists, it is the type of discriminatory social norm that Title VII was enacted to counter.[322] The court thus identified and addressed the real issue in the case, and the pretext analysis did nothing but clutter the opinion and impede the analysis.

In another recent reverse discrimination case, *Smith v. Lockheed-Martin Corp.*,[323] the ultimate issue focused on comparative treatment of African-American and white employees.[324] White employees were fired for emailing a racially offensive joke, while black employees who engaged in similar conduct were not fired.[325] The court forced the evidence into the *McDonnell Douglas* analysis but twice expressly disclaimed any real operative importance of the analysis. The court rejected the notion that satisfying the three stages of the pretext analysis is the sine qua non of surviving summary judgment. Thus, failure to produce a suitable comparator did not doom plaintiff's case. The pretext analysis merely provides guidance in resolving whether there is a reasonable inference of discrimination.[326]

The Eleventh Circuit in *Smith* went on to find that the plaintiff presented sufficient circumstantial evidence of racial discrimination to avoid summary judgment.[327] However, the court's blasphemous

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318. *Id.* at 590.
319. *Id.* at 596.
320. *See id.* (noting that the issue had not previously been decided by the federal courts).
321. *Id.* at 597 (drawing upon historical context to conclude that African Americans often use the word ironically, satirically, or affectionately, while the use of the word by white persons often carries belittling, oppressive, and dehumanizing undertones).
322. *Id.*
323. 644 F.3d 1321 (11th Cir. 2011).
324. *Id.* at 1326.
325. *Id.* at 1324.
326. *Id.* at 1346 n.86.
327. *Id.* at 1346–47.

declarations regarding *McDonnell Douglas* would cause another court to reassert fealty to the res ipsa analysis. A federal district court, faced with citation to the apostasy of *Smith*'s departure from *McDonnell Douglas*, declared as follows: "To the extent that *Smith* suggests the burden-shifting paradigm of *McDonnell Douglas* can be ignored in a case based on circumstantial evidence, freeing the plaintiff from any obligation to establish a prima facie case, it is in tension with a long line of Eleventh Circuit precedent."[328] Although some courts diverge from the *McDonnell Douglas* straightjacket, most do not. Even among those that do, virtually all feel constrained to at least pay lip service to it.

The restrictive effect on litigation, shoving all evidence into the three stages of the pretext analysis, and the focus of courts on the framework rather than the real issues of discrimination are therefore intertwined. When courts liberate themselves somewhat from the *McDonnell Douglas* vise grip, as in *Burlington* and *Smith*, they are able to identify and grapple with the actual issues of employment discrimination.

*3. The tenacity of res ipsa/*McDonnell Douglas

In light of the weaknesses of the framework and forty years of tinkering with it, one would think that the Supreme Court long ago would have expelled res ipsa from employment discrimination law. Congress presented a golden opportunity when, in the Civil Rights Act of 1991, it codified a version of the mixed-motives analysis.[329] The Court in *Desert Palace*, could have sent res ipsa back to tort law rather than leave lower courts with the conundrum of which framework applies in a given case, but it did not.[330] Notwithstanding an outpouring of scholarship arguing that *Desert Palace* should have signaled the end of *McDonnell Douglas*,[331] it flourishes.

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328. Bell v. Crowne Mgmt., LLC, 844 F. Supp. 2d 1222, 1232 (S.D. Ala. 2012).

329. 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006).

330. *See* Katz, *supra* note 299, at 643 (noting that "when the Court had a chance to clarify things in *Desert Palace, Inc. v. Costa*, the Court made things worse, not better"); Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 512 (2008) (arguing that *Desert Palace* has contributed to the vitality of *McDonnell Douglas*).

331. *See, e.g.*, Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1932 (2004) (arguing that the "motivating factor" showing should apply to all individual disparate treatment cases because the slight differences between the *McDonnell Douglas* and the Civil Rights Act of 1991 do not justify maintaining two separate analyses for individual disparate treatment cases).

When the Fifth Circuit took on the task of addressing the question left by *Desert Palace* in *Rachid v. Jack in the Box, Inc.*, it merged the pretext and mixed-motives analyses into what it termed the "modified *McDonnell Douglas* approach," which retained the three stages of the pretext analysis, although they seemed perfunctory when the court grafted the "motivating factor" standard of mixed motives onto the third stage as an alternative to pretext.[332] In another example of the resilience of *McDonnell Douglas*, when bills were introduced in Congress to overturn the Supreme Court's decision in *Gross*, they expressly stated that the *McDonnell Douglas* analysis was to be preserved as a way to prove discrimination under all the employment discrimination laws.[333] Thus, notwithstanding its monumental shortcomings, the *McDonnell Douglas* proof structure maintains a tenacious and powerful grip on employment discrimination law—almost like the siren call of res ipsa loquitur beckoning first-year law students to the perilous shoals of peripheral issues and irrelevant discussion.

III. THROWING RES IPSA OUT OF THE EMPLOYMENT DISCRIMINATION WAREHOUSE

Seeing the *McDonnell Douglas* proof structure as res ipsa helps explain why it increasingly has served employment discrimination law poorly. Perhaps this view of the hoary pretext analysis will provide some added impetus for finally dispatching with it and moving to a more appropriate and more flexible standard. Also this perspective should encourage Congress and the courts to develop a more deliberative and discriminating approach for incorporating tort law into employment discrimination law. Adopting such a new approach is important because tort law still has much to offer the younger and relatively underdeveloped body of employment discrimination law.

Like the infamous barrel that fell from the warehouse and spawned res ipsa loquitur, *McDonnell Douglas* needs to be cast out of employment discrimination law. Although there have been many calls to expel the *McDonnell Douglas* analysis, few of them have invoked its ill-matched tort underpinnings as a reason.[334] Judge Wood of the Seventh Circuit, in a recent concurring opinion, called for the abrogation of the *McDonnell Douglas* analysis because, although it was

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332. Rachid v. Jack in the Box, Inc., 376 F. 3d 305, 312 (5th Cir. 2004).

333. *See supra* note 27 (discussing the proposed Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. § 2(a)(4)(E) (2012)).

334. *See* Prenkert, *supra* note 330, at 513 (noting that "a chorus of commentators has rightfully clamored to euthanize the [*McDonnell Douglas*] framework").

designed to clarify and simplify a plaintiff's presentation of her case, "both of those goals have gone by the wayside."[335] Judge Wood then declared that "[c]ourts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation . . . could not be handled in the same straightforward way."[336] Ironically, many employment discrimination law principles, including the *McDonnell Douglas* analysis, have been borrowed from tort law.

The *McDonnell Douglas* proof structure's declining performance over four decades already has been chronicled. If the Supreme Court had expressly recognized the analysis as at least a derivative of res ipsa when it adopted the analysis in 1973, there were reasons based on res ipsa's use and track record in tort law to question whether it was appropriate for employment discrimination law. For one, although res ipsa was a doctrine to be used by plaintiffs to assist them in presenting circumstantial evidence of a breach, it was a tool of last resort for plaintiffs who could not otherwise prove a breach.[337] The Court in *McDonnell Douglas* seemed to understand that it was establishing the fundamental analytical tool for individual disparate treatment claims—the most common employment discrimination claims.[338] The pretext analysis would not be a backup tool like res ipsa was. An analytical tool of last resort was not designed to function as the most basic analyses of a body of law.

Two other distinctions between the use of res ipsa in tort law and the pretext analysis in employment discrimination also should have raised concerns. First, the Court was adopting, without significant modification, an analysis for intentional discrimination cases used in torts for negligence cases.[339] A number of tort doctrines distinguish between negligence and intentional torts and impose greater burdens on alleged intentional tortfeasors than negligent

335. Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring).
336. *Id.*
337. *See* Okediji, *supra* note 25, at 84 (discussing res ipsa loquitur as a way of proving negligence without actual proof).
338. *See* Sperino, *Rethinking*, *supra* note 4, at 76 (noting that the Court created the burden-shifting test to analyze individual disparate treatment cases); *cf.* Zimmer, *supra* note 331, at 1893 ("'Disparate treatment' . . . is the most easily understood type of discrimination." (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))).
339. *See* Okediji, *supra* note 25, at 83 (explaining that in torts, circumstantial evidence may be sufficient to support an inference of negligence under res ipsa loquitur).

tortfeasors.[340] Perhaps the Court considered that the three stages and shifting burdens of production of the *McDonnell Douglas* analysis were an adequate modification of res ipsa. However, considering the distinction between negligence and intent, the Court might have shifted both the burden of production and the burden of persuasion, but it did not.[341] Or the Court might have resolved the issue of what procedural effect to attach to a showing of pretext in ways more favorable to plaintiffs than it did in *Hicks* and *Reeves*[342] Second, whereas res ipsa usually addresses physical acts and physical injuries, the *McDonnell Douglas* analysis is used to evaluate a mental state. While courts may be readily willing to draw inferences about physical facts based on surrogate questions, they may be less comfortable inferring discriminatory mental states based on similar surrogate questions.

Beyond the distinctions between torts and employment discrimination, res ipsa did not have a sterling record of performance in torts. There were a number of problems and uncertainties with res ipsa in tort law,[343] and those difficulties merited consideration before res ipsa was adopted as the basic analysis for a landmark civil rights and public policy statute.

Regardless of whether the Court should have adopted res ipsa for employment discrimination law and whether it could have been modified adequately to accommodate employment discrimination law, the time has come to push the *McDonnell Douglas* barrel out of the warehouse. A superior alternative is readily available. In the Civil Rights Act of 1991, Congress codified a version of the mixed-motives analysis in Title VII.[344] The plaintiff establishes a prima facie case by demonstrating that discrimination was a motivating factor in the employer's decision.[345] At that point, the employer is liable, but if the

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340. Consider, for example, with negligence, proximate cause cuts off liability of defendants for unforeseeable harm, whereas the principle of extended liability holds that defendants who commit intentional torts are liable for the full extent of harm they cause, no matter how unforeseeable. *See* Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co., 390 So. 2d 601, 607 (Ala. 1980) (setting forth the policy rationale that liability should fall on the intentional tortfeasor, rather than allow the victim to go uncompensated).

341. *See* Okediji, *supra* note 25, at 85 (explaining that although the burden of persuasion remains with the plaintiff under the *McDonnell Douglas* framework, policy considerations ultimately dictate where the burden of persuasion lies).

342. *See supra* Part II.C.2(a)(i).

343. *See supra* Part II.A (discussing three troublesome features of res ipsa loquitor: (1) uncertainty regarding the predicate facts that determine the applicability of res ipsa loquitur in any given case; (2) the procedural effect of res ipsa loquitur; and (3) uncertainty regarding the types of cases to which res ipsa loquitur is applicable).

344. 42 U.S.C. § 2000e-2(m), -5(g)(2)(B) (2006).

345. *Id.* § 2000e-2(m).

employer can demonstrate (satisfy the burden of persuasion) that it would have made the same decision for nondiscriminatory reasons, the defendant employer can limit remedies.[346] Commentators have advocated for the replacement of the *McDonnell Douglas* analysis with some version of the mixed-motives analysis, at least similar to the one added to Title VII by the Civil Rights Act of 1991.[347] That framework resolves or ameliorates many of the problems raised by the pretext analysis. First, the motivating factor standard does not artificially cabin the types of evidence that must be presented by the parties as the pretext analysis does. Second, it does not base an inference or presumption of discrimination on presentation of evidence to satisfy predicate issues that are surrogates for the real issue of discrimination. Third, the motivating factor standard does not establish an inference or presumption based on historical patterns of discrimination that may have changed, or that courts and jurors may think have changed, over time. In the foregoing ways and others, the mixed-motives analysis is less rigid and more generally appropriate than the pretext analysis, and it already has Congress's imprimatur for use with Title VII.

Even if *McDonnell Douglas* were rejected, another step would be necessary to make the statutory mixed-motives analysis applicable to individual disparate treatment claims under all the employment discrimination laws. The Supreme Court in *Gross* defined the statutory language "because of" as meaning but for causation and rejected the mixed-motives analysis for age discrimination claims under the Age Discrimination in Employment Act.[348] Because of

346. *Id.* § 2000e-5(g)(2)(B).

347. *See, e.g.*, William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 106, 108 (2009) (arguing that Congress should replace the pretext proof structure with a version of the modified mixed-motives structure); Katz, *supra* note 299, at 643–44 (advocating for the framework prescribed by the Civil Rights Act of 1991, which would eliminate doctrinal confusion and unify fragmented disparate treatment law); Prenkert, *supra* note 330, at 516 (urging Congress to clarify mixed-motives jurisprudence by creating a unified framework and eradicating *McDonnell Douglas*); Zimmer, *supra* note 331, at 1891 (analyzing *Desert Palace*'s potential to surpass *McDonnell Douglas* and give rise to a new, uniform proof structure).

348. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009). Since the Court was interpreting the "because of" statutory language, the decision might render the mixed-motives framework inapplicable to all discrimination statutes except Title VII, which also has the statutory "motivating factor" language. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961–62 (7th Cir. 2010) (*Gross* holding renders mixed motives inapplicable to Americans with Disabilities Act). *But see* Smith v. Xerox Corp., 602 F.3d 320 (5th Cir. 2010) (declining to extend the holding of *Gross* to antiretaliation provision in Title VII). The Supreme Court has granted certiorari to resolve the applicability of *Gross* to the antiretaliation provision of Title VII. Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448 (5th Cir. 2012), *cert. granted*, 2013 WL 203552 (U.S. Jan. 18, 2013) (No. 12-484).

Gross, to effectuate unification of all disparate treatment law under mixed motives, either the Court would need to overrule the case or Congress would have to make the mixed-motives analysis available under all the employment discrimination statutes.[349]

Another issue that Congress should consider if the statutory mixed-motives analysis were to become the sole individual disparate treatment analysis is the effect of the same-decision defense.[350] Under the current Title VII defense, if a defendant satisfies the burden of persuasion on same-decision, it will limit remedies, eliminating all monetary remedies that would go to the plaintiff.[351] Before recommending that Congress simply amend the statutes to say that the current statutory mixed-motives analysis applies to all individual intentional discrimination cases, it is worth asking whether changes should be made in light of the fact that the pretext proof structure would be gone. In the 1991 Act, Congress clearly indicated the way in which it wished to modify the *Price Waterhouse* mixed-motives analysis. However, if Congress also had thought it were abolishing the pretext analysis and replacing it with a unified analysis, it might have done things differently, such as giving a different effect to the same-decision defense. Thus, Congress should consider modifications to the current statutory mixed-motives proof structure.

Congress is the better body to abrogate *McDonnell Douglas* than the Supreme Court.[352] Although the Court should have dispensed with the pretext analysis in *Desert Palace* or thereafter, when it eradicated the line of demarcation between cases to be analyzed under pretext and mixed motives, the Court did not do so, and nine years after *Desert Palace*, it still has not done so. Rather than removing ill-fitting tort principles from employment discrimination law, *Staub* demonstrates that the Court is inclined to forge ahead with importation of tort law.[353] Generally, the Court simply has not expressly overruled employment discrimination precedents.[354]

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349. The proposed Protecting Older Workers Against Discrimination Act would do this, but it also would preserve the *McDonnell Douglas* analysis. S. 2189, 112th Cong. § 2(a)(4)(E) (2012).

350. Corbett, *supra* note 347, at 107.

351. 42 U.S.C. § 2000e-5(g)(2)(B); Corbett, *supra* note 347, at 106.

352. *See* Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 889 (2010) (commenting that "given the Court's apparent hostility to unification . . . unification will need to come from Congress").

353. *See supra* notes 32–44 and accompanying text (discussing the Supreme Court's adoption of the highly-criticized doctrine of proximate cause in *Staub*).

354. *See* Lemos, *supra* note 6, at 427 (observing that "[i]f judged by the rate of outright reversals, the Court's decisions in the Title VII arena have been exceptionally stable: not once in the history of Title VII has the Court overruled a prior opinion").

Furthermore, if the pretext analysis were thrown out of the warehouse, there are issues that Congress needs to consider in refining the replacement mixed-motives framework. Removing the *McDonnell Douglas* analysis should substantially improve employment discrimination law. That important step also might prompt consideration of the general issue of tortification of employment discrimination law. But that is an issue for another day.

CONCLUSION

The Supreme Court's latest foray into tortification of employment discrimination law in *Staub* is alarming. However, one can only guess how the concept of proximate cause will develop in discrimination law. The *McDonnell Douglas*/pretext framework, which is a thinly veiled version of res ipsa loquitur, has a forty-year track record. Whether res ipsa should have been imported into discrimination law with only minor modifications in 1973 is debatable. Regardless, during its tenure, it has suffered from declining performance, it has mangled cases, and it has impeded the innovative development of employment discrimination law. The time has come to reject this pretext for res ipsa loquitur and let employment discrimination speak for itself.